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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 920

THE UNITED STATES, APPELLANT

vs.

SWIFT & COMPANY

No. 921

SWIFT & COMPANY, APPELLANT

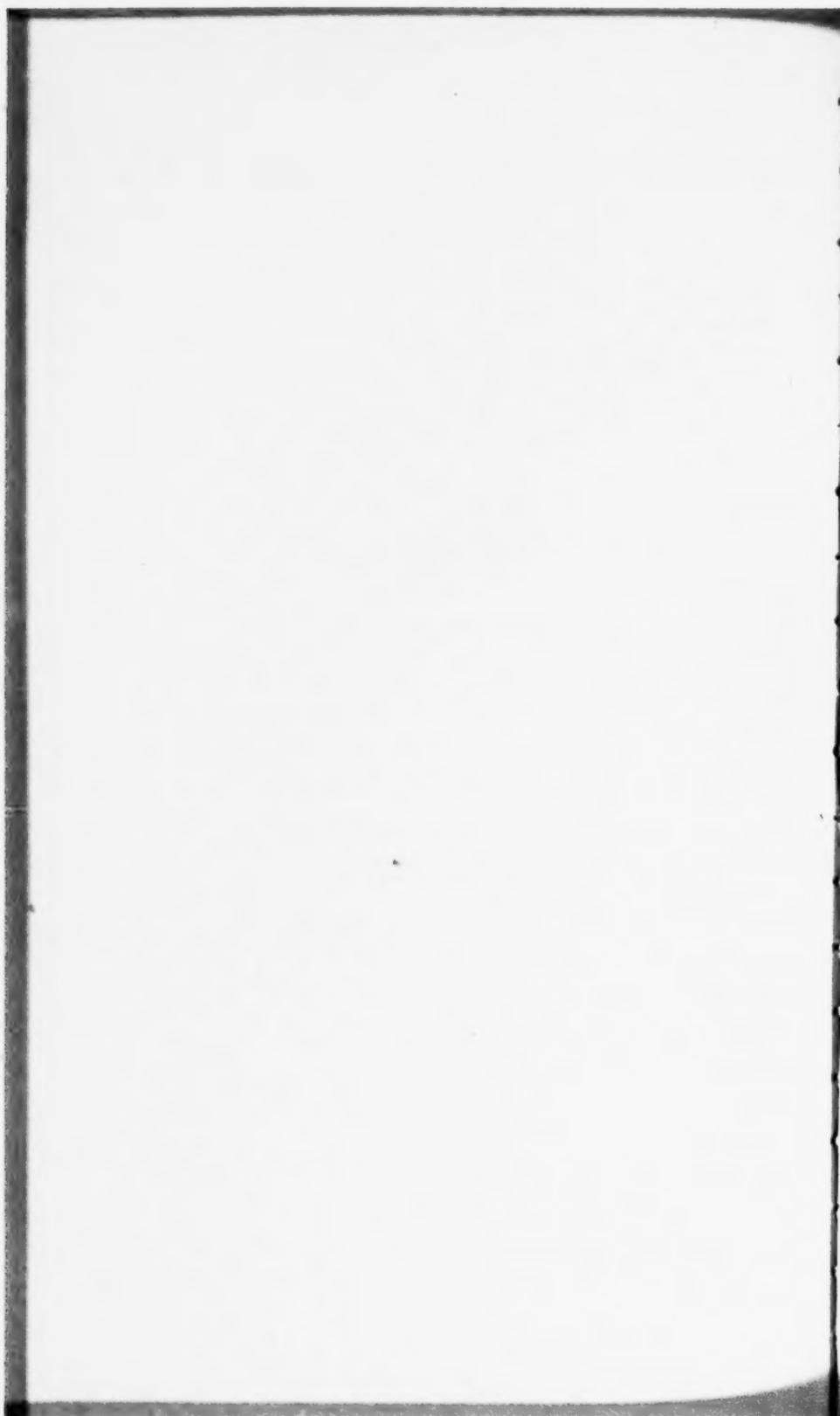
vs.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

INDEX

	Original 1	Print 3
Record from Court of Claims.....	1	1
Petition.....		
Exhibit A. Letter from Swift & Co. to War Department, November 12, 1918.....	31	16
Exhibit B. Letter from United States Food Administration to Swift & Co., December 3, 1918.....	32	17
Proceedings on demurrer.....	34	18
H story of further proceedings.....	34	18
Defendant's counterclaim.....	35	18
Replication to counterclaim.....	45	25
Argument and submission.....	47	25
Findings of fact.....	48	26
Conclusion of law.....	74	51
Opinion, Downey, J.....	75	55
Judgment.....		
Proceedings after entry of judgment.....	102	84
Order overruling motion for new trial.....	102	84
Petition for and order allowing appeal.....	103	85
Petition for and order allowing cross appeal.....	104	85
Clerk's certificate.....	105	85



1

In Court of Claims of the United States

SWIFT & COMPANY, CLAIMANT

v.

No. 4-A

THE UNITED STATES OF AMERICA, RESPONDENT

I. PETITION. Filed January 7, 1921

To the honorable the Chief Justice and the Associate Justices of the Court of Claims of the United States:

The claimant, Swift & Company, respectfully represents for a first cause of action :

I

2 The claimant, Swift & Company, is a corporation organized and existing under the laws of the State of Illinois and having its principal office and place of business in the city of Chicago in that State.

II

Commencing at a time prior to September, 1917, and continuing throughout the year 1918, Brigadier General Kniskern, U. S. A., was on duty in Chicago as depot quartermaster and as zone supply officer, with authority to represent the Secretary of War in the procurement of food supplies for the Army, amongst other things, packing-house products, including bacon and canned meats; and during the same period Major Skiles, U. S. A., under the general supervision of General Kniskern, was vested with authority to give orders and negotiate contracts for the procurement of packing house products, including bacon and canned meats.

III

Section 1 of the act of Congress of March 2, 1919 (40 Stat. 1272), known as the Dent Act, provides in part as follows:

"That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis, that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November

twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law * * *."

Section 2 of said act provides:

"That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said Section in the event that such individual, firm, company or corporation shall not be willing to accept the adjustment, payment or compensation offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said Section.

IV

Between September, 1917, and November 9, 1918, inclusive, General Kniskern and Major Skiles met representatives of the claimant, Swift & Company, and of Armour & Company, Libby, McNeill & Libby, Morris & Company, Cudahy Packing Company, Wilson & Company, and Jacob Dold Packing Company, in a series of conferences, for the purpose of making arrangements for obtaining for the Army its requirements of bacon and canned meats. Said companies were informed that they were expected to employ their facilities continuously in the production of bacon and canned meats for the Army to the extent necessary to meet the Army's requirements as communicated from time to time.

The course of dealings between the parties embodied in and growing out of the above described conferences gave rise to an agreement within the meaning of the aforesaid act of Congress of March 2, 1919, by which the United States promised to purchase from each of said companies until seasonably notified to the contrary all the bacon and canned meats of the required specifications which it might be able to produce, and each of said companies undertook to produce such articles to the limit of its capacity and to make deliveries upon reasonable notice in advance in quantities and at times and places to be determined from time to time by the United States. The course of procedure under said agreement was for General Kniskern or Major Skiles to call the representatives of said companies into conference at intervals and inform them of the total quantities of bacon and canned meats that would be needed during a stated period in the future. Each company thereupon submitted a tender or estimate of the portion of the total requirements it considered itself capable of delivering during the stated period. The Army authorities thereafter made allotments to each company of the quantities which it would be called upon to deliver during such period. Some time during August or September, 1918, the formal issuance of such

allotments was transferred to the United States Food Administration, an agency of Government created by the President under authority of an act of Congress approved August 10, 1917 (40 Stat. 276), and during November and December, 1918, that organization, as agent of the War Department, issued the allotments. The quantities of bacon and canned meats called for in the allotments issued by the Food Administration were, however, the quantities fixed and determined by General Kniskern and Major Skiles in behalf of the Secretary of War, and the quantities of each product stated in each allotment were exactly those which said officers 5 requested the Food Administration to allot to each of the beforementioned seven companies. It was also understood and agreed that a reasonable price should be paid for the articles which each company was called upon to produce and deliver, such reasonable price to be determined separately for each month's delivery.

VI

At a meeting on November 9, 1918, General Kniskern and Major Skiles stated to representatives of the beforementioned seven companies, including this claimant, the Army's total requirements of bacon and canned meats for each of the months of January, February and March, 1919, and requested that each of them proceed up to the limit of its capacity to fill such requirements. Immediately thereafter, pursuant to its aforesaid agreement with the United States set forth in paragraphs IV and V of this petition, the claimant commenced production of bacon of the required specifications, and prior to November 12, 1918, made expenditures and incurred obligations in that behalf. On December 3, 1918, the United States Food Administration, at the request of the War Department, notified the claimant in writing of the exact quantities of bacon that it would be required to deliver under its aforesaid agreement in each of the months of January, February, and March, 1919, to wit: In January, 6,000,000 pounds of bacon put up in tin cans (known as serial No. 10 bacon); in February, 5,500,000 pounds of the same; and in March, 6,000,000 pounds of the same.

VII

On January 24, 1919, the War Department notified the claimant in writing that it would not accept any of the bacon ordered to be delivered in March, 1919, excepting bacon then in process of 6 cure. At that time, of the 6,000,000 pounds of bacon ordered to be delivered in March, 1919, the claimant had already placed in cure 5,272,257 pounds, which had been duly inspected and approved by agents of the War Department. Upon receipt of this notice the claimant ceased to place further bacon in cure, but, conformably with such notice, proceeded to make ready for delivery in March, 1919, what was then in cure by smoking (smoking being the

next stage of production after curing) and canning it. On March 5, 1919, the War Department notified the claimant in writing not to place in smoke any more of the bacon ordered for delivery in March, 1919, but stated that what had already been placed in smoke for delivery in March, 1919, would be accepted. The claimant thereupon ceased to place further bacon in smoke, but, conformably with said last-mentioned notice, proceeded to can and make ready for delivery that which had been smoked or which was then in smoke. In all, the claimant smoked, canned and had ready for delivery in March, 1919, 4,197,696 of the 5,272,257 pounds of bacon which had already been placed in cure when the aforesaid notice to put no more bacon in cure was received. The bacon so made ready for delivery was trimmed, cured and packed under the inspection of agents of the War Department. Later in the month of March, 1919, the War Department notified the claimant that it would not accept any of the bacon ordered to be delivered in March, 1919. The notice of March 5, 1919, stated that the War Department would negotiate with the claimant with a view to making settlement for the material the claimant would have on hand after completion of the February deliveries, and instructed the claimant to use every effort to dispose of such material in order that an adjustment might be quickly made. On April 29, 1919, the War Department again stated its purpose to make compensation for the loss caused by its refusal to accept the bacon ordered for delivery in March, 1919, and again instructed the claimant to dispose of the bacon it had prepared for delivery in that month. The claimant thereupon, for the account of the United States, disposed of said 5,272,257 pounds of bacon to the best possible advantage, realizing, after deducting carrying charges and expenses of marketing, for the 4,197,696 pounds which had been smoked and canned the sum of \$901,616.77, and for the remaining 1,074,561 pounds which had been cured but not smoked or canned the sum of \$174,901.35.

VIII

The placing in cure by the claimant of 5,272,257 pounds of bacon for delivery in March, 1919, and the smoking and canning by the claimant of 4,197,696 pounds of the same, as set forth in paragraph VII of this petition, were in fulfilment of its aforesaid agreement with the United States set forth in paragraphs IV and V of this petition, and in notifying the claimant that it would not accept, and in refusing to accept or pay for, any of such bacon, the United States violated said agreement.

IX

The claimant is entitled to fair and just compensation in payment and discharge of its agreement with the United States set forth in paragraphs IV and V of this petition, which, as aforesaid,

the United States has refused to perform. The amount to which the claimant is thus entitled is as follows:

8	Cost of manufacture of the 4,197,696 pounds of bacon which were cured, smoked and canned	\$2,056,656.76
	Remuneration for such manufacture	51,416.42
		<hr/>
		2,108,073.18
	Net amount realized from sale of said 4,197,696 pounds, after deducting carrying charges and expenses of marketing	<hr/>
		901,616.77
		<hr/>
		\$1,206,456.41
	Cost of manufacture of the 1,074,561 pounds of bacon which were cured but not smoked or canned	<hr/>
	Remuneration for such manufacture	409,142.21
		10,228.55
		<hr/>
	Net amount realized from sale of said 1,074,561 pounds	419,370.76
		174,901.35
		<hr/>
	Loss on materials purchased or reserved for remainder of order	244,469.41
		8,959.27
	Total compensation due the claimant	<hr/> 1,459,885.09

9 The loss sustained by the claimant in the production of bacon for March delivery was due in part to the high cost of manufacture in the manner required by the War Department, and in part to the small commercial value of bacon prepared in that manner.

X

Prior to June 30, 1919, the claimant, pursuant to Section 1 of the aforesaid act of Congress of March 2, 1919, presented to the proper authorities designated by the Secretary of War its claim for fair and just compensation in payment and discharge of the agreement between the claimant and the United States set forth in paragraphs IV and V of this petition. One of such authorities, the Board of Contract Adjustment, heard said claim together with similar claims presented by the other six companies named in paragraph IV of this petition. In an opinion dated March 23, 1920, the board, while explicitly recognizing the equities of the claims, stated that it felt constrained to find that no agreement had been made with the claimants prior to November 12, 1918, and therefore denied relief under the aforesaid act of Congress of March 2, 1919, the existence of an agreement prior to November 12, 1918, being a condition of obtaining relief under that act. An application for rehearing was denied by the board on June 5, 1920. On appeal the Secretary of War, in an opinion dated July 23, 1920, while likewise recognizing the equities of the claims, affirmed the decision of the board.

XI

The claimant avers that its claim as set forth in this its first cause of action is included within the class of cases specified in section 1 of the aforesaid act of Congress of March 2, 1919. The

10 claimant further avers that having failed to obtain relief from the Secretary of War under section 1 of said act, this honorable court has jurisdiction under section 2 thereof to hear and determine the present cause of action.

XII

The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States and has never taken part in rebellion or insurrection against it. The claimant is the sole owner of the claim herein set forth, and no assignment or transfer thereof or of any interest therein has been made.

XIII

Demand has been made upon the United States, but it has refused to pay the claimant any part of the sum of \$1,459,885.09 which is now due and owing to the claimant from the United States, as set forth in paragraph IX of this petition.

Wherefore the claimant prays judgment against the United States on this its first cause of action for said sum of \$1,459,885.09.

For a second cause of action the claimant, Swift & Company, respectfully represents:

XIV

The claimant renews and repeats all the allegations in paragraphs I, II and III of this petition.

11

XV

As aforesaid, between September, 1917, and November 9, 1918, inclusive, General Kniskern and Major Skiles met representatives of the claimant, Swift & Company, and of Armour & Company, Libby, McNeill & Libby, Morris & Company, Cudahy Packing Company, Wilson & Company and Jacob Dold Packing Company, in a series of conferences, for the purpose of making arrangements for obtaining for the Army its requirements of bacon and canned meats. At a conference held on November 9, 1918, General Kniskern and Major Skiles stated to representatives of these seven companies the Army's total requirements of bacon and canned meats for each of the months of January, February and March, 1919, and at the same time requested each of said companies to proceed at once up to the limit of its capacity to fill the stated requirements, and further requested each to submit within a short time a tender or estimate of the portion of the total requirements it would be able to deliver during each of said months. Said request constituted an offer by the United States to take from each of said companies, in return for the promise of each to produce to the extent of its facilities, its entire production of bacon and canned meats of the required

specifications during the period stated, subject to the right of the War Department, upon reasonable notice, to reduce the quantity to be taken from any one of said companies so as to bring the quantity taken from all within the total requirements for the period. Each of said companies, including the claimant, assented to said request, and such assent was understood by both the United States and said companies to constitute a promise upon the part of each of said companies to produce bacon and canned meats to the extent of its facilities as requested by the United States. An agreement within the meaning of the aforesaid act of Congress of March 2, 1919, was there-with concluded between the claimant and the United States
12 covering production to be delivered during the months of January, February and March, 1919. The parties to said agreement concluded on November 9, 1918, understood from the course of their prior dealings that a reasonable price would be paid for said bacon and canned meats, such reasonable price to be determined separately for each month's delivery.

XVI

Immediately following said meeting on November 9, 1918, the claimant commenced production to carry out the agreement made on that date, as aforesaid, and prior to November 12, 1918, made expenditures and incurred obligations in that behalf. It also submitted to the Army authorities an estimate or tender of the quantities of bacon required by the Army which it considered itself capable of producing for delivery in each of the months of January, February and March, 1919. On December 3, 1918, the United States Food Administration, at the request of the War Department, notified the claimant in writing of the exact quantities of bacon that it would be required to deliver under said agreement of November 9, 1918, in each of the months of January, February and March, 1919, to wit: In January, 6,000,000 pounds of bacon put up in tin cans (known as serial No. 10 bacon); in February, 5,500,000 pounds of the same; and in March, 6,000,000 pounds of the same.

XVII

The claimant renews and repeats in respect to bacon covered by the agreement set forth in paragraph XV of this petition, all the allegations of paragraph VII.

XVIII

The placing in cure by the claimant of 5,272,257 pounds of bacon for delivery in March, 1919, and the smoking and canning by the claimant of 4,197,696 pounds of the same, as set forth in paragraph VII of this petition, were in fulfilment of its said agreement with the United States made on November 9,

1918, set forth in paragraph XV of this petition, and in notifying the claimant that it would not accept and in refusing to accept or pay for, any of such bacon, the United States violated said agreement.

XIX

The claimant is entitled to fair and just compensation in payment and discharge of its agreement with the United States set forth in paragraph XV of this petition, which, as aforesaid the United States has refused to perform. The amount to which the claimant is thus entitled is as follows:

14	Cost of manufacture of the 4,197,696 pounds of bacon which were cured, smoked and canned-----	\$2,056,656.76
	Remuneration for such manufacture-----	51,416.42
		<hr/>
		2,108,073.18
	Net amount realized from sale of said 4,197,696 pounds, after deducting carrying charges and expenses of marketing-----	901,616.17
		<hr/>
	Cost of manufacture of the 1,074,561 pounds of bacon which were cured but not smoked or canned-----	409,142.21
	Remuneration for such manufacture-----	10,228.55
		<hr/>
	Net amount realized from sale of said 1,074,561 pounds-----	419,370.76
		<hr/>
	Loss on materials purchase or reserved for manufacturing remainder of order-----	174,901.35
		<hr/>
	Total compensation due the claimant-----	244,469.41
		<hr/>
15	15. The loss sustained by the claimant in the production of bacon for March delivery was due in part to the high cost of manufacture in the manner required by the War Department, and in part to the small commercial value of bacon prepared in that manner.	8,950.27
		<hr/>
		1,459,885.09

XX

The claimant renews and repeats as to the agreement set forth in paragraph XV of this petition, and its claim arising therefrom, all the allegations of paragraph X, of paragraph XI, and of paragraph XII.

XXI

Demand has been made upon the United States, but it has refused to pay the claimant any part of the sum of \$1,459,885.09 which is now due and owing to the claimant from the United States, as set forth in paragraph XIX of this petition.

Wherefore the claimant prays judgment against the United States on this its second cause of action for said sum of \$1,459,885.09.

For a third cause of action the claimant, Swift & Company, respectfully represents:

XXII

The claimant renews and repeats all the allegations in paragraphs I and II of this petition.

16

XXIII

Section 120 of the act of Congress of June 3, 1916 (39 Stat. 166, 213), known as the national defense act, provides in part as follows:

"The President, in time of war, or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

"Compliance with all such orders for products or materials shall be obligatory on any individual, firm, (etc) * * * and shall take precedence over all other orders and contracts theretofore placed with such individual, firm (etc) * * *."

Section 3709 of the Revised Statutes provides as follows:

"All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

XXIV

As aforesaid, between September, 1917, and November 9,
17 1918, inclusive, General Kniskern and Major Skiles met representatives of the claimant, Swift & Company, and of Armour & Company, Libby, McNeill & Libby, Morris & Company, Cudahy Packing Company, Wilson & Company and Jacob Dold Packing Company, in a series of conferences, for the purpose of making arrangements for obtaining for the Army its requirements of bacon and canned meats. At a conference held on November 9, 1918, General Kniskern and Major Skiles stated to representatives of these seven companies the Army's total requirements of bacon and canned

meats for each of the months of January, February and March, 1919, and at the same time requested each of said companies to proceed at once up to the limit of its capacity to fill the stated requirements, and further requested each to submit within a short time a tender or estimate of the portion of the total requirements it would be able to deliver during each of said months.

XXV

Thereupon the claimant made such a tender, dated November 12, 1918, a copy of which is attached hereto, made a part hereof and marked "Exhibit A." Said tender constituted an offer by the claimant to furnish to the Army in January, February and March, 1919, serial No. 8 bacon, which was bacon packed in crates, and serial No. 10 bacon, which was packed in tin cans, in the quantities therein set forth or any portion thereof. The quantity of serial No. 10 bacon so offered was 17,500,000 pounds; 6,000,000 pounds to be delivered in the month of January, 1919, 5,500,000 pounds in the month of February, 1919, and 6,000,000 pounds in the month of March, 1919. Thereafter, on December 3, 1918, the United States Food Administration, at the request of General Kniskern and Major Skiles, who represented the Secretary of War, placed an order in writing with the claimant for the quantity of serial No. 10

bacon so offered for delivery in each of the months of January, February and March, 1919, as aforesaid. A copy of this order is attached hereto, made part hereof and marked "Exhibit B." By said order the United States agreed to take from the claimant and pay for the quantity of serial No. 10 bacon which the claimant by its tender had offered to produce and deliver during each of the months named, and concluded between the claimant and the United States a contract of purchase and sale for future delivery. It was understood and agreed that a reasonable price should be paid for said bacon, such reasonable price to be determined separately for each month's delivery. The quantity thus contracted for to be delivered in March, 1919, consisted of 6,000,000 pounds of serial No. 10 bacon. Said contract was binding upon and enforceable against the United States, more particularly by virtue of section 120 of the aforesaid act of Congress of June 3, 1916, providing that "in time of war, or when war is imminent," the President shall be authorized, through the head of any department of the Government, "in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry, for such product or material as may be required"; and by virtue also of section 3709 of the Revised Statutes aforesaid providing that "when immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner

in which such articles are usually bought and sold, or such services engaged, between individuals."

XXVI

On December 3, 1918, the United States was at war and there was a public exigency requiring immediate manufacture of bacon for the Army, and General Kniskern and Major Skiles reasonably believed that the United States needed for its Army the quantities of bacon set forth in the aforesaid allotment or order of that date. The claimant had on that date a plant usually producing and capable of producing bacon of the kind and character ordered from it.

XXVII

The claimant renews and repeats in respect to bacon covered by the contract set forth in paragraph XXV of this petition, all the allegations of paragraph VII.

XXVIII

The claimant avers that a reasonable price for the bacon cured, smoked, canned and ready for delivery in March, 1919, as understood and contemplated in the contract set forth in paragraph XXV of this petition, was, for 3,328,800 pounds prepared at Chicago and Kansas City, 50 cents per pound f. o. b. those points, respectively, and for 868,896 pounds prepared at Boston, 50.70 cents per pound.

XXIX

The placing in cure by the claimant of 5,272,257 pounds of bacon for delivery in March, 1919, and the smoking and canning by the claimant of 4,197,696 pounds of the same, as set forth in paragraph VII of this petition, were in fulfilment of its aforesaid contract with the United States set forth in paragraph XXV of this petition, and in notifying the claimant that it would not accept, and in refusing to accept or pay for any of said bacon, the United States violated said agreement, and thereby caused the claimant to suffer loss and damage as follows:

20 Contract price of the 4,197,696 pounds of bacon which were cured, smoked and canned	\$2,104,930.27
Net amount realized from sale of said 4,197,696 pounds, after deducting carrying charges and expenses of marketing	901,616.77
	\$1,203,313.50
Cost of manufacture of the 1,074,561 pounds of bacon which were cured but not smoked or canned	409,142.21
Net amount realized from sale of said 1,074,561 pounds	174,901.35
	234,240.86

Profit which would have been earned under the contract, had claimant been permitted to carry it out, on 1,802,304 pounds of bacon (the difference between 6,000,000 pounds contracted for and the 4,197,696 pounds manufactured as above stated)-----	\$20,726.50
Loss on materials purchased or reserved for manufacturing said 1,802,304 pounds-----	8,059.27
Total loss and damage-----	1,467,240.13

21 The loss sustained by the claimant in the production of bacon for March delivery was due in part to the high cost of manufacture in the manner required by the War Department, and in part to the small commercial value of bacon prepared in that manner.

XXX

The claimant renews and repeats all the allegations of paragraph XII of this petition.

XXXI

Demand has been made upon the United States, but it has refused to pay the claimant any part of said sum of \$1,467,240.13 which is now due and owing to the claimant from the United States as set forth in paragraph XXIX of this petition.

Wherefore the claimant prays judgment against the United States on this its third cause of action for said sum of \$1,467,240.13.

For a fourth cause of action the claimant, Swift & Company, respectfully represents:

XXXII

The claimant renews and repeats all the allegations in paragraphs I, II, XXIII and XXIV of this petition.

XXXIII

On December 3, 1918, the United States Food Administration, at the request of General Kniskern and Major Skiles, 22 who represented the Secretary of War, placed an order in writing with the claimant for 17,500,000 pounds of serial No. 10 bacon, which, as aforesaid, was bacon packed in tin cans; 6,000,000 pounds to be delivered in the month of January, 1919, 5,500,000 pounds in the month of February, 1919, and 6,000,000 pounds in the month of March, 1919. A copy of this order is attached hereto, made part hereof and marked "Exhibit B." By said order the United States agreed to take from the claimant and pay for the quantity of serial No. 10 bacon therein stipulated for delivery in each of the months of January, February and March, 1919. The claimant accepted said order and by so doing agreed to deliver to the United States the quantity of bacon therein stipulated in each

of the months named. A contract of purchase and sale for future delivery was thereby concluded between the claimant and the United States. It was understood and agreed that a reasonable price should be paid for said bacon, such reasonable price to be determined for each month's delivery. The quantity thus contracted for to be delivered in March, 1919, consisted of 6,000,000 pounds of serial No. 10 bacon. Said contract was binding upon and enforceable against the United States, more particularly by virtue of section 120 of the aforesaid act of Congress of June 3, 1916, providing that "in time of war, or when war is imminent," the President shall be authorized, through the head of any department of the Government, "in addition to the present authorized methods of purchase and procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry, for such product or material as may be required"; and by virtue also of section 3709 of the Revised Statutes aforesaid providing that "when immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

23

XXXIV

The claimant renews and repeats in respect to bacon covered by the contract set forth in paragraph XXXIII of this petition, all the allegations of paragraph XXVI, of paragraph VII, and of paragraph XXVIII.

XXXV

The placing in cure by the claimant of 5,272,257 pounds of bacon for delivery in March, 1919, and the smoking and canning by the claimant of 4,197,696 pounds of the same, as set forth in paragraph VII of this petition, were in fulfilment of its aforesaid contract with the United States set forth in paragraph XXXIII of this petition, and in notifying the claimant that it would not accept, and in refusing to accept or pay for any of said bacon, the United States violated said agreement, and thereby caused the claimant to suffer loss and damage as follows:

24	Contract price of the 4,197,696 pounds of bacon which were cured, smoked and canned	\$2,104,930.27
Net amount realized from sale of said 4,197,696 pounds, after deducting carrying charges and expenses of marketing	901,616.77	\$1,203,313.50
Cost of manufacture of the 1,074,561 pounds of bacon which were cured but not smoked or canned	409,142.21	
Net amount realized from sale of said 1,074,561 pounds	174,901.35	234,240.86

Profit which would have been earned under the contract, had claimant been permitted to carry it out, on 1,802,304 pounds of bacon (the difference between 6,000,000 pounds contracted for and the 4,197,696 pounds manufactured as above stated).
 Loss on materials purchased or reserved for manufacturing said 1,802,304 pounds-----

\$20,726.50
 8,959.27

1,467,240.13

25 The loss sustained by the claimant in the production of bacon for March delivery was due in part to the high cost of manufacture in the manner required by the War Department, and in part to the small commercial value of bacon prepared in that manner.

XXXVI

The claimant renews and repeats all the allegations of paragraph XII of this petition.

XXXVII

Demand has been made upon the United States, but it has refused to pay the claimant any part of said sum of \$1,467,240.13 which is now due and owing to the claimant from the United States as set forth in paragraph XXXV of this petition.

Wherefore the claimant prays judgment against the United States on this its fourth cause of action for said sum of \$1,467,240.13.

For a fifth cause of action, the claimant, Swift & Company, respectfully represents:

XXXVIII

The claimant renews and repeats all the allegations of paragraphs I, II, XXIII and XXIV of this petition.

XXXIX

On December 3, 1918, the United States Food Administration, at the request of General Kniskern and Major Skiles,
 26 who represented the Secretary of War, placed an order in writing with the claimant for 17,500,000 pounds of serial No. 10 bacon, which, as aforesaid, was bacon packed in tin cans, 6,000,000 pounds to be delivered in the month of January, 1919, 5,500,000 pounds in the month of February, 1919, and 6,000,000 pounds in the month of March, 1919. A copy of this order is attached hereto, made a part hereof, and marked "Exhibit B." The claimant proceeded forthwith to comply with this order.

XL

The claimant renews and repeats all the allegations of paragraph XXVI of this petition.

XLI

Compliance with the aforesaid order of December 3, 1918, was made obligatory upon the claimant by virtue of section 120 of the aforesaid act of Congress of June 3, 1916. In consequence whereof, the United States became liable under the aforesaid act of Congress and under the fifth amendment to the Constitution of the United States on an implied contract to make just compensation to the claimant for work and labor done and expenses incurred in carrying out said order up to the time it was countermanded as set forth in paragraph VII of this petition.

XLII

By section 145 of the Judicial Code of March 3, 1911 (Ch. 231, 36 Stat. 1136), this court has jurisdiction of all claims founded upon any contract, express or implied, with the Government of the United States, as well as of all claims founded upon the Constitution of the United States or any law of Congress.

27

XLIII

The claimant renews and repeats in respect to bacon covered by the above mentioned implied contract all the allegations of paragraph VII of this petition.

XLIV

The placing in cure by the claimant of 5,272,257 pounds of bacon for delivery in March, 1919, and the smoking and canning by the claimant of 4,197,696 pounds of the same, as set forth in paragraph VII of this petition, were in compliance with the aforesaid obligatory order, and the claimant is entitled to just compensation for work and labor done and expenses incurred in that behalf, as follows:

28	Cost of manufacture of the 4,197,696 pounds of bacon which were cured, smoked and canned-----	\$2,056,656.76
	Remuneration for such manufacture-----	51,416.42
		<hr/>
		2,108,073.18
	Net amount realized from sale of said 4,197,696 pounds, after deducting carrying charges and expenses of marketing-----	901,616.77
		<hr/>
		\$1,206,456.41
	Cost of manufacture of the 1,074,561 pounds of bacon which were cured but not smoked or canned-----	409,142.21
	Remuneration for such manufacture-----	10,228.55
		<hr/>
		419,370.76
	Net amount realized from sale of said 1,074,561 pounds-----	174,901.35
		<hr/>
	Loss on materials purchased or reserved for manufacturing remainder of order-----	244,460.41
		<hr/>
	Total compensation due the claimant-----	8,959.27
		<hr/>
	35850-25-2	1,459,885.09

29 The loss sustained by the claimant in the production of bacon for March delivery was due in part to the high cost of manufacture in the manner required by the War Department, and in part to the small commercial value of bacon prepared in that manner.

XLV

The claimant renews and repeats all the allegations of paragraph XII of this petition.

XLVI

Demand has been made upon the United States, but it has refused to pay the claimant any part of said sum of \$1,459,885.09 which is now due and owing to the claimant from the United States, as set forth in paragraph XLIV of this petition.

Wherefore the claimant prays judgment against the United States on this its fifth cause of action for said sum of \$1,459,885.09.

SWIFT & COMPANY,
By GREGORY & TODD,
Attorneys for Claimant,
Southern Building, Washington, D. C.

[Jurat showing the foregoing was duly sworn to by G. F. Swift, jr., omitted in printing.]

31

EXHIBIT A TO PETITION

NOVEMBER 12, 1918.

WAR DEPARTMENT,

*General Depot of the Quartermaster Corps,
1819 West 39th Street, Chicago, Illinois
(Attention Maj. Skiles).*

GENTLEMEN: Referring meeting in your office Saturday, November 9th, please be advised we offer for delivery during January, February and March, 1919.

17,500,000 lbs. Serial 10 bacon
and 4,000,000 " " 8 bacon

Total, 21,500,000 lbs.

We offer for delivery each month as shown under:

	Serial No. 10	Serial No. 8
January-----	6,000,000 lbs.	1,400,000 lbs.
February-----	5,500,000	1,200,000
March-----	6,000,000	1,400,000
Total-----	17,500,000 lbs.	4,000,000 lbs.

You will note we are offering a larger proportion of Serial No. 10 than of Serial No. 8 bacon. This because we have gone to great expense in equipping canning rooms at Chicago, Kansas City and Boston on the understanding that you very much preferred serial No. 10 bacon to serial No. 8. The amount serial 10 given above is the minimum amount required to enable us to operate our canning rooms at fair capacity. If necessary, we are willing to have our offers serial 8 bacon increased and serial 10 decreased proportionately to the extent you find necessary bearing in mind that we will appreciate as liberal a proportion of serial No. 10 bacon as possible.

32 Will you kindly advise if we shall figure to put down above amounts for delivery as shown. After receipt of such advice we will furnish you with statement of amounts we will put in cure at each plant.

Yours respectfully,

SWIFT & COMPANY,
Per G. F. SWIFT, Jr.

Prov. Dept., JH—JL.

EXHIBIT B TO PETITION

United States Food Administration

Meat Division

111 WEST WASHINGTON STREET,
CHICAGO, ILLINOIS, Dec. 3, 1918.
D. C. P. No. 2187.

From: U. S. Food Administration, Meat Division.

To: Swift & Company, U. S. Yards, Chicago, Ill.

Subject:

1. On requisition of the packing house products branch, Subsistence Division, office of Quartermaster General, 1819 W. 39th St., Chicago, Ill., you have been allotted for delivery during the month of—

	Product	Quantity	Price
January, 1919..	Bacon, serial No. 10--	6,000,000 lbs.	To be determined
February, "	" " "	5,500,000 "	later.
March, "	" " "	6,000,000 "	

33 2. The above to be in accordance with Q. M. C. Form 120 and amendments thereto.

3. For any further information regarding this allotment, apply to the packing house products branch, Subsistence Division, office of the Quartermaster General, 1819 W. 39th St., Chicago, Ill.

UNITED STATES FOOD ADMINISTRATION,
MEAT DIVISION,
By E. L. Roy.

F—Accepted:

(2964)

34

II. Proceedings on demurrer

On March 3, 1921, the defendant filed a demurrer to the plaintiff's petition.

On April 7, 1921, the demurrer was argued and submitted by Messers. Charles F. Jones and J. Robert Anderson, for the defendant, by Mr. G. Carroll Todd, for plaintiff, and by Mr. Harry Covington, as amicus curiae.

On April 18, 1921, the court entered the following order on the demurrer:

"The court deeming it desirable to determine this case on the evidence, the within demurrer is overruled, all the questions of law being reserved.

"By the COURT."

III. History of further proceedings

On June 2, 1923, the defendant filed a motion for leave to file a counterclaim.

On June 11, 1923, the plaintiff's objections to the filing of the counterclaim was argued and submitted by Mr. G. Carroll Todd, for the plaintiff, and by Messrs. Charles F. Jones and J. Robert

Anderson, for the defendant.

35 On June 11, 1923, the court entered an order allowing defendant's motion for leave to file a counterclaim. Said counterclaim is as follows:

IV. Defendant's counterclaim. Filed June 11, 1923

Comes now the defendant, by the Attorney General, and shows and makes known to the court that the plaintiff herein was at the commencement of this suit, and still is, justly indebted to the United States in the sum of one million five hundred seventy-one thousand eight hundred eighty-two dollars (\$1,571,882.00). Said indebtedness consists of certain improper and illegal charges presented by the plaintiff to the defendant on account of Army bacon, delivered from September, 1918, to February, 1919, both inclusive, which charges were, by mistake, paid by the defendant to the plaintiff in the settlement of the bills and accounts so presented.

The items comprising the erroneous charges paid to the plaintiff by the defendant are as follows:

A. On account of canned Army bacon, serial No. 10, delivered in September, 1918

- (1) Difference between value of green bellies charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in September, 1918, and their value to Swift & Co. as reflected by its books:

5,050,088 lbs., at 3.875 c. per lb-----	\$195,690.91
---	--------------

(2)	Difference between shrinkages in curing, smoking, and canning charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in September, 1918, and shrinkages established by Government accountants through examination of the books and records of Swift & Co.:	
	5,050,088 lbs., at 2.112 c. per lb.	\$106,657.87
(3)	Difference due to the inclusion of interest on investment as an item of cost of production by Swift & Co. for September, 1918:	
	5,050,088 lbs., at 1.08 c. per lb.	54,540.94
36	(4) Difference due to the inclusion of selling expense as an item of cost of production by Swift & Co. for September, 1918:	
	5,050,088 lbs., at .145 c. per lb.	7,322.63
(5)	Total differences, items (1) to (4), inclusive.	364,212.35
	Add: Variation due to fractional differences of unit costs.	9.20
	Net differences	364,203.15
(6)	Deduct: Remuneration due Swift & Co. at 2½ per cent of cost after elimination of items (1) to (4), inclusive.	54,512.85
(7)	Total amount due the United States Government on account of canned Army bacon, serial No. 10, delivered in September, 1918.	309,690.30
B. On account of canned Army bacon, serial No. 10, delivered in October, 1918		
(8)	Difference between value of green bellies charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in October, 1918, and their value to Swift & Co. as reflected by its books:	
	5,615,064 lbs., at 1.5 c. per lb.	\$84,225.96
(9)	Difference between shrinkages in curing, smoking, and canning charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in October, 1918, and shrinkages established by Government accountants through examination of the books and records of Swift & Co.:	
	5,615,064 lbs., at 1.778 c. per lb.	99,835.84
(10)	Difference due to the inclusion of interest on investment as an item of cost of production by Swift & Co. for October, 1918:	
	5,615,064 lbs., at 1.01 c. per lb.	56,712.14
(11)	Total differences, items (8) to (10), inclusive:	
	5,615,064 lbs., at 4.288 c. per lb.	240,773.94
	Add: Variation due to fractional differences of unit costs.	1.71
	Net differences	240,775.65
(12)	Deduct: Remuneration due Swift & Co. at 2½ per cent of cost after elimination of items (8) to (10), inclusive.	65,633.65
(13)	Total amount due the United States Government on account of canned Army bacon, serial No. 10, delivered in October, 1918.	175,142.00
C. On account of canned Army bacon, serial No. 10, delivered in November, 1918		
(14)	Difference between value of green bellies charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in November, 1918, and their value to Swift & Co., as reflected by its books:	
	4,480,072 lbs., at 0.75 c. per lb.	\$33,600.54

(15) Difference between shrinkages in curing, smoking, and canning charged the Government in computing prices of canned Army bacon, serial No. 10, for deliveries in November, 1918, and shrinkages established by Government accountants through examination of the books and records of Swift & Co.:	
4,480,072 lbs., at 1.592 c. per lb.	\$71,322.75
(16) Difference due to the inclusion of interest on investment as an item of cost of production by Swift & Co. for November, 1918:	
4,480,072 lbs., at 1.01 c. per lb.	45,248.73
(17) Difference due to excess of War Department price over Swift & Co. cost:	
4,480,072 lbs., at 0.87 c. per lb.	38,976.63
(18) Total differences, items (14) to (17), inclusive	189,148.65
Deduct: Variation due to fractional difference of unit costs	15.17
Net differences	189,133.48
(19) Deduct: Remuneration due Swift & Co., at 2½ per cent of cost after elimination of items (14) to (16), inclusive	\$51,432.02
(20) Freight differential of 0.70 c. per lb. on 1,000,008 lbs. shipped from Boston, Mass.	7,000.06
	58,432.08
(21) Total amount due the United States Government on account of canned Army bacon, serial No. 10, delivered in November, 1918	130,701.40
<i>D. On account of canned Army bacon, serial No. 10, delivered in December, 1918</i>	
(22) Difference between the value of green bellies charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in December, 1918, and their value to Swift & Co. as reflected by its books:	
4,450,056 lbs., at 0.5 c. per lb.	\$22,250.28
38 (23) Difference between shrinkages in curing, smoking, and canning charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in December, 1918, and shrinkages established by Government accountants through examination of the books and records of Swift & Co.:	
4,450,056 lbs., at 1.553 c. per lb.	69,109.27
(24) Difference due to the inclusion of interest on investment as an item of cost of production by Swift & Co. for December, 1918:	
4,450,056 lbs., at 1.01 c. per lb.	44,045.57
(25) Difference due to excess of War Department price over Swift & Co. cost:	
3,480,064, at 0.70 c. per lb.	23,800.39
(26) Total differences, items (22) to (25), inclusive	160,105.61
Deduct: Variation due to fractional difference of unit costs	1.91
Net differences	160,103.70
(27) Deduct: Remuneration due Swift & Co. at 2½ per cent of cost after elimination of items (22) to (24), inclusive	51,621.15
(28) Total amount due the United States Government on account of canned Army bacon, serial No. 10, delivered in December, 1918	108,482.55
<i>E. On account of canned Army bacon, serial No. 10, delivered in January, 1919</i>	
(29) Difference between value of green bellies charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in January, 1919, and their value to Swift & Co. as reflected by its books:	
4,830,120 lbs., at 4.5 c. per lb.	\$217,355.40

(30) Difference between shrinkages in curing, smoking, and canning charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in January, 1919, and shrinkages established by Government accountants through examination of the books and records of Swift & Co.:		
4,830,120 lbs., at 2.166 c. per lb-----	\$104,620.40	
(31) Difference due to the inclusion of interest on investment as an item of cost of production by Swift & Co. for January, 1919:		
4,830,120 lbs., at 1.05 c. per lb-----	50,716.25	
39 (32) Difference due to error in canning costs in favor of Swift & Co. allowed:		
4,830,120 lbs., at 0.02 c. per lb (credit)-----	966.02	
(33) Total differences, items (29) to (32), inclusive-----	371,726.03	
Add: Variation due to fractional differences of unit costs-----	16.11	
Net differences-----	371,742.14	
(34) Deduct: Remuneration due Swift & Co. at 2½ per cent of cost after elimination of items (29) to (32), inclusive-----	50,631.85	
(35) Total amount due the United States Government on account of canned Army bacon, serial No. 10, delivered in January, 1919-----	321,110.29	

F. On account of canned Army bacon, serial No. 10, delivered in February, 1919

(36) Difference between value of green bellies charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in February, 1919, and their value to Swift & Co., as reflected by its books:		
5,500,080 lbs., at 4.25 c. per lb-----	\$233,753.40	
(37) Difference between shrinkages in curing, smoking, and canning charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in February, 1919, and shrinkages established by Government accountants through examination of the books and records of Swift & Co.:		
5,500,080 lbs., at 2.142 c. per lb-----	118,361.72	
(38) Difference due to the inclusion of interest on investment as an item of cost of production by Swift & Co., for February, 1919:		
5,500,080 lbs., at 1.05 c. per lb-----	57,750.84	
(39) Difference due to excess of Swift & Co. cost over War Department price. Allowance in favor of Swift & Co.:		
5,500,080 lbs., at 0.09 c. per lb. (credit)-----	4,950.08	
(40) Total differences, items (36) to (39), inclusive-----	404,915.88	
Deduct: Variation due to fractional differences of unit costs-----	2.00	
Net differences-----	404,913.88	
(41) Deduct: Remuneration due Swift & Co. at 2½ per cent of cost after elimination of items (36) to (38), inclusive-----	58,792.36	
(42) Total amount due the United States Government on account of canned Army bacon, serial No. 10, delivered in February, 1919-----	346,121.52	

G. On account of canned Army bacon, serial No. 10, extra short clears, delivered in September, 1918

(43) Difference between value of extra short clears charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in September, 1918, and their value to Swift & Co. as reflected by its books:		
2,400,120 lbs., at 2.625 c. per lb-----	\$63,003.15	

(44) Difference between shrinkages in curing, smoking, and canning charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in September, 1918, and shrinkages computed by Government accountants:		
2,400,120 lbs., at 0.437 c. per lb.	\$10,488.52	
(45) Difference due to the inclusion of interest on investment as an item of cost of production by Swift & Co. for September, 1918:		
2,400,120 lbs., at 1.08 c. per lb.	25,921.29	
(46) Difference due to the inclusion of selling expense as an item of cost of production by Swift & Co. for September, 1918:		
2,400,120 lbs., at 0.145 c. per lb.	3,480.18	
(47) Total differences, items (43) to (46), inclusive	102,893.14	
Add: Variation due to fractional differences of unit costs--	.19	
Net differences	102,893.33	
(48) Deduct: Remuneration due Swift & Co., at 2½ per cent of cost after elimination of items (43) to (46), inclusive	25,081.25	
(49) Total amount due the United States Government on account of canned Army bacon, serial No. 10, delivered in September, 1918	77,812.08	
<i>II. On account of canned Army bacon, serial No. 10, extra short clears, delivered in October, 1918</i>		
(50) Difference between value of extra short clears charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in October, 1918, and their value to Swift & Co. as reflected by its books:		
1,305,072 lbs., at 0.5 c. per lb.	\$6,525.36	
(51) Difference between shrinkages in curing, smoking, and canning charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in October, 1918, and shrinkages computed by Government accountants:		
1,305,072 lbs., at 0.086 c. per lb.	1,122.36	
41 (52) Difference due to the inclusion of interest on investment as an item of cost of production by Swift & Co. for October, 1918:		
1,305,072 lbs., at 1.01 c. per lb.	13,181.22	
(53) Total differences, items (50) to (52), inclusive	20,828.94	
Add: Variation due to fractional differences of unit costs--	.19	
Net differences	20,829.13	
(54) Deduct: Remuneration due Swift & Co. at 2½ per cent of cost after elimination of items (50) to (52), inclusive	14,736.06	
(55) Total amount due the United States Government on account of canned Army bacon, serial No. 10, delivered in October, 1918	6,093.07	
<i>I. On account of canned Army bacon, serial No. 10, extra short clears, delivered in November, 1918</i>		
(56) Difference between value of extra short clears charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in November, 1918, and their value to Swift & Co. as reflected by its books:		
1,520,032 lbs., at 0.75 c. per lb.	\$11,400.24	
(57) Difference between shrinkages in curing, smoking, and canning charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in November, 1918, and shrinkages computed by Government accountants:		
1,520,032 lbs., at 0.126 c. per lb.	1,915.24	

(58) Difference due to the inclusion of interest on investment as an item of cost of production by Swift & Co. for November, 1918:		
1,520,032 lbs., at 1.01 c. per lb.	\$15,352.32	
(59) Difference due to excess of War Department price over Swift & Co. cost:		
1,520,032 lbs.	6,232.13	
(60) Total differences, items (58) to (59), inclusive	34,899.93	
Add: Variation due to fractional differences of unit costs	.78	
Net differences	34,900.71	
(61) Deduct: Remuneration due Swift & Co., at 2½ per cent of cost, after elimination of items (58) to (59), inclusive	\$16,376.15	
Freight differential allowed Swift & Co. on shipment of 300,024 lbs. from Boston, Mass., at 0.7 c. per lb.	2,100.17	
42 (62) Total amount due the United States Government on account of canned Army bacon, serial No. 10, delivered in November, 1918	18,476.32	
J. On account of canned Army bacon, serial No. 10, extra short clears, delivered in December, 1918	16,424.39	
(63) Difference between value of extra short clears charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in December, 1918, and their value to Swift & Co. as reflected by its books:		
2,050,064 lbs., at 0.75 c. per lb.	\$15,375.48	
(64) Difference between shrinkages in curing, smoking, and canning charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in December, 1918, and shrinkages computed by Government accountants:		
2,050,064 lbs., at 0.126 c. per lb.	2,583.08	
(65) Difference due to the inclusion of interest on investment as an item of cost of production by Swift & Co. for December, 1918:		
2,050,064 lbs., at 1.01 c. per lb.	20,705.64	
(66) Difference due to excess of War Department price over Swift & Co. cost	4,920.15	
(67) Total differences, items (63) to (66), inclusive	43,584.35	
Deduct: Variation due to fractional differences of unit costs	.29	
Net differences	43,584.06	
(68) Deduct: Remuneration due Swift & Co., at 2½ per cent of cost after elimination of items (63) to (65) inclusive	\$22,102.69	
Freight differential allowed Swift & Co. at 0.7 c. per lb. on 350,000 lbs. shipped from Boston, Mass.	2,450.00	
(69) Total amount due the United States Government on account of canned Army bacon, serial No. 10, delivered in December, 1918	24,612.69	
K. On account of canned Army bacon, serial No. 10, extra short clears, delivered in January, 1919	18,971.37	
(70) Difference between value of extra short clears, charged Government in computing price of canned Army bacon, serial No. 10, for deliveries in January, 1919, and their value to Swift & Co. as reflected by its books:		
1,150,130 lbs. at 4.5 c. per lb.	\$51,755.76	

43	(71) Difference between shrinkages in curing, smoking, and canning charged the Government in computing price of canned Army bacon, serial No. 10, for deliveries in January, 1919, and shrinkages computed by Government accountants:	
	1,150,130 lbs., at 0.762 c. per lb.	\$8,763.97
(72)	Difference due to the inclusion of interest on investment as an item of cost of production by Swift & Co. for January, 1919:	
	1,150,130 lbs., at 1.05 c. per lb.	12,076.35
(73)	Total differences, items (70) to (72), inclusive	72,596.08
	Deduct variation due to fractional differences of unit costs	.30
	Net differences	72,595.78
(74)	Deduct: Remuneration due Swift & Co., at 2½ per cent of cost after elimination of items (70) to (72), inclusive	11,262.75
(75)	Total amount due the United States Government on account of canned Army bacon, serial No. 10, delivered in January, 1919	61,333.03

RECAPITULATION

L. On account of canned Army bacon, serial No. 10, delivered between September, 1918, and February, 1919, inclusive

(76)	Difference between value of green bellies and extra short clears charged the Government in computing prices of canned Army bacon, serial No. 10, for deliveries in September, 1918, to February, 1919, inclusive, and their value to Swift & Co. as reflected by its books:	
	38,350,896 lbs. of product	\$934,936.48
(77)	Difference between shrinkages in curing, smoking, and canning charged the Government in computing prices of canned Army bacon, serial No. 10, for deliveries in September, 1918, to February, 1919, and shrinkages established by Government accountants through examination of the books and records of Swift & Co.:	
	38,350,896 lbs. of product	594,780.92
(78)	Difference due to inclusion of interest on investment as an item of cost of production for deliveries September, 1918, to February, 1919, inclusive:	
	38,350,896 lbs. of product	397,151.29
(79)	Difference due to error in cost of canning in favor of Swift & Co.:	
	4,830,120 lbs. of product (credit)	966.02
44	(80) Difference due to inclusion of selling expense as an item of cost of production by Swift & Co. for deliveries September, 1918, to February, 1919, inclusive:	
	7,450,208 lbs. of product	10,802.81
(81)	Net difference due to excess of War Department prices over Swift & Co. costs:	
	17,030,312 lbs. of product	68,079.22
(82)	Total differences, items (76) to (81), inclusive	2,005,684.90
	Deduct: Variations due to fractional differences of unit costs	9.80
	Net differences	2,005,675.01
(83)	Deduct: Remuneration due Swift & Co. at 2½ per cent of cost after elimination of items (76) to (80), inclusive	\$422,242.78
	Freight differential of 0.7 c. per lb. allowed on 1,650,032 lbs. shipped from Boston, Mass.	11,550.23
		433,793.01

(84) Total amount due the United States Government on account of canned Army bacon, serial No. 10, deliveries September, 1918, to February, 1919, inclusive..... \$1,571,882.00

Wherefore the defendant demands judgment against the plaintiff in the sum of \$1,571,882.00.

ROBERT H. LOVETT,
Assistant Attorney General.

CHARLES F. JONES,
J. ROBERT ANDERSON,
Special Assistants to the Attorney General.

45 *V. Replication to counterclaim. Filed September 10, 1923*

Now comes the claimant, Swift & Company, and by way of replication to the counterclaim heretofore filed by the defendant, says:

First. It denies that it is indebted to the defendant in the sum of \$1,571,882, or any part thereof.

Second. It denies that the alleged improper and illegal charges, of which the said indebtedness is alleged to consist, were ever presented by it to the defendant on account of Army bacon delivered from September, 1918, to February, 1919.

46 Third. It denies that said charges were paid by the defendant by mistake or otherwise.

Fourth. It denies that any of the items, set forth and described in the counterclaim as comprising the erroneous charges, was in fact erroneous.

Fifth. For further answer it avers that all the payments made to it by the United States on account of bacon delivered from September, 1918, to February, 1919, both inclusive, were based on prices approved and adopted by the duly authorized agents of the United States, who had complete and unrestricted access to all the facts, and that payments so made constitute binding settlements.

SWIFT & COMPANY,
By (s.) GREGORY & TODD,
 * *Attorneys for Claimant,*
 Southern Building, Washington, D. C.

[Jurat showing the foregoing was duly sworn to by G. F. Swift, jr., omitted in printing.]

47 *VI. Argument and submission of case*

On December 18 and 19, 1923, this case was argued and submitted on merits by Mr. G. Carroll Todd, for plaintiff, Mr. Harry Covington, as amicus curiae, and by Messrs. Charles F. Jones and J. Robert Anderson, for defendant.

48 VII. *Findings of fact, conclusion of law, and opinion of the Court by Downey, J. Entered March 17, 1924*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

The plaintiff, Swift & Co., is and at and before the times herein involved was a corporation duly organized under the laws of the State of Illinois, and having its principal place of business at the Union Stock Yards in Cook County in that State.

It was founded for the purpose of purchasing livestock and converting the same into fresh and cured meats for human consumption, the manufacture of oleomargarine, oils, lard, tallow, and fertilizer, and the transaction of all business incident to a general slaughtering and packing establishment, and was so engaged at all times involved herein.

II

The plaintiff, Swift & Co., owned and operated in its own name plants at Chicago, Ill., St. Paul, Minn., South Omaha, Nebr., Sioux City, Iowa, Kansas City, Mo., St. Louis, Mo., and National Stock Yards, Ill.

The Plankinton Packing Co., incorporated under the laws of the State of Wisconsin; the G. H. Hammond Co., incorporated under the laws of the State of Michigan; and the Omaha Packing Co., incorporated under the laws of the State of Kentucky, operated under their corporate names aforesaid but all of the stock of each of said corporations was owned by Swift & Co., the plaintiff, which company directed the operations thereof.

John P. Squire & Co., was and is a corporation organized under the laws of the State of Maine but authorized to do business in the State of Massachusetts, in which State was its principal place of business, more than 90 per cent of the stock of which corporation was owned by the estate of George F. Swift, who was the founder of Swift & Co.

III

On April 6, 1917, the Congress of the United States declared war against Germany, and on April 12, 1917, the following general order was promulgated by the Secretary of War:

GENERAL ORDERS
No. 49

WAR DEPARTMENT,
Washington, April 28, 1917.

I—The following War Department orders are published to the Army for the information and guidance of all concerned:

“WAR DEPARTMENT,
“Washington, D. C., April 12, 1917.

“ORDERS:

“1. It is hereby declared that an emergency exists within the meaning of section 3709, R. S., and other statutes which, except cases of emergency from the requirement that contracts for and on behalf of the Government shall only be made after advertising as to all contracts under the War Department for the supply of the War Department and the supply and equipment of the Army and for fortifications and other works of defense; and until further orders such contracts will be made without resort to advertising for bids in the letting of the same.

“2. Where time will permit, information will be given to the Munitions Board constituted by the National Council of Defense, through the supply bureaus' representative, of orders to be made for supplies, with a view of assistance from the board in placing the orders and in order that the supplies of the War Department may be coordinated with those of the Navy and other executive departments and secured at prices not in excess of those paid by other departments.

“3. It is to be understood, however, that the responsibility of the several supply bureaus for promptly supplying the needs of the Army must be recognized, and where time will not admit of the delay involved in consulting the Munitions Board the supply bureaus will retain their present initiative in contracting without reference to the board.

“NEWTON D. BAKER,
“Secretary of War.”

By order of the Secretary of War:

H. L. SCOTT,
Major General, Chief of Staff.

Official:

H. P. McCAIN,
The Adjutant General.

IV

By Special Orders No. 94, War Department, dated April 24, 1917, it was directed that Col. Albert D. Kniskern, relieved from duty as quartermaster, Central Department, “assume charge of the general depot of the Quartermaster Corps at Chicago, Ill.,” and by Special Orders No. 193, War Department, dated August 20, 1917, it was directed that Capt. Otto F. Skiles, Quartermaster Officers’ Reserve Corps, be assigned to active duty and proceed to Chicago, Ill., “and report in person to the depot quartermaster for assignment to duty as his assistant.”

Colonel (afterwards Brigadier General) Kniskern remained on duty as depot quartermaster at Chicago until his retirement on September 1, 1919.

Maj. Gen. George W. Goethals was Acting Quartermaster General from December 26, 1917, until his detail, on April 16, 1918, as assistant Chief of Staff and Director of the Division of Purchase, Storage, and Traffic of the General Staff, which was a consolidation of the Purchase and Supply Divisions and the Storage and Traffic Divisions, which had been created by General Order No. 14, of February 9, 1918, issued by the Acting Chief of Staff. General Orders No. 16, of February 11, 1918, relating to control of quartermasters' supplies recited that "In order to provide suitable and adequate supplies for the Army, both for domestic and overseas consumption, divisions have been established in the office of the Quartermaster General which determine requirements," etc., and that "Based on data received by the Quartermaster General from the Chief of Staff, requirements are computed by the Quartermaster General through the Quartermaster Supply Control Bureau and forwarded to the several procurement divisions for purchase or manufacture," and that "the general supply depots of the Quartermaster Corps will be operated in accordance with instructions received from the Quartermaster General through the several procurement divisions." By General Order No. 36, of April 16, 1918, the consolidation referred to was provided for. The powers of the consolidated Division of Purchase, Storage, and Traffic, so far as Quartermaster supplies were concerned, were at this time advisory only, and its chief function was coordination.

General Goethals was succeeded in April, 1918, as Acting Quartermaster General by Brig. Gen. R. E. Wood, who continued as Acting Quartermaster General during the period here involved.

Different divisions, five in number, among them a subsistence division, has been created in the office of the Quartermaster General and, effective November 7, 1918, in connection with and as a part of a reorganization of the entire purchase, storage, and traffic system, they were transferred to the office of the Director of Purchase and Storage. Effective September 12, 1918, Brigadier General Wood, then Acting Quartermaster General, was appointed Director of Purchase and Storage. By the order so designating him it was provided that he should "have responsibility for and authority over the purchase of such articles as are assigned to his organization from time to time, and the storage, distribution, and issue within the United States of all supplies for the Army." The "paramount consideration" in connection with this reorganization was, by official orders, declared to be "uninterrupted supply" and in connection with the office of Director of Purchase and Storage the plan was "to reorganize and adapt the office of the Quartermaster General to the present plan, to use it as the control office for purchase and storage and to bring commodity sections from other bureaus over to the commodity sections of the Quartermaster Department where most of them already were," and in adopting this plan the office of the

Quartermaster General was "reorganized to meet the needs
51 of the Director of Purchase and Storage" and commodity

purchasing sections to meet the needs of the entire War Department were created in the office of the Director of Purchase.

V

On July 3, 1918, by Office Order No. 491, Quartermaster General's Office, there was established in Chicago a packing-house products branch of the subsistence division of the Quartermaster General's Office to be located in the general supply depot of the Quartermaster Corps at Chicago, to be under the immediate direction and control of the depot quartermaster, and to be responsible for all matters pertaining to the procurement, production, and inspection of packing-house products, subject to the control of the Quartermaster General.

The interpretation of this order by the then Acting Quartermaster General was, "that whereas the purchasing of supplies was concentrated in Washington, that Chicago being the food market, we delegated to General Kniskern the purchase of meat products and articles of that kind."

VI

On October 28, 1918, by Purchase and Storage Notice No. 21, issued by Brig. Gen. R. E. Wood, as Director of Purchase and Storage, supply zones were created and by said order the Director of Purchase and Storage appointed "as his representative in each general procurement zone the present depot quartermaster to act and be known as the zone supply officer," who was "charged with authority over and responsibility for supply activities within the zone under his jurisdiction."

This form of organization in effect transferred the field organization of the Quartermaster Corps to the office of the Director of Purchase and Storage. The procurement divisions which had theretofore existed in the Quartermaster Corps were transferred to the supply zones created in the purchase and storage organization, these zones being practically the same as those formerly existing in the Quartermaster Corps, over each of which the proper depot quartermaster exercised jurisdiction, and the depot quartermasters of the Quartermaster Corps became zone supply officers and representatives, as such, of the Director of Purchase and Storage.

Existing orders and regulations of the several supply corps with respect to supply activities transferred to the Director of Purchase and Storage were continued in effect, "providing that the zone supply officers constituted by the notice shall have final authority in their respective zones over all matters referred to in existing orders and regulations."

VII

There were numerous other orders, circulars, bulletins, and notices, aside from those herein specifically referred to, which were issued

from time to time, many of them by General Goethals as Director of Purchase, Storage, and Traffic, a division of the office of the Chief of

52 Staff which came finally to act in an executive rather than an advisory capacity, and many divisions, bureaus, and boards were created with assigned duties and authority, and reorganizations were had for the purpose of remedying defects in former organizations.

The general purpose was to centralize control of purchase and distribution of Army supplies in one authoritative head in Washington, which, acting directly or more generally through its subordinate bureaus, boards, or committees, should pass upon needs, authorize and supervise purchases, approve contracts, etc. There were a number of different departments created in the Division of Purchase, Storage, and Traffic, General Staff, and after the creation of the Division of Purchase and Storage and the appointment of General Wood, Acting Quartermaster General, as Director of Purchase and Storage, that office was organized with many divisions, some of a general administrative character and many others with jurisdiction in the matter of purchases of specific character of supplies.

Supply circulars and such like documents as were sent out in large numbers were for the most part in general terms so far as the character of the supplies to which applicable was concerned and they required some preliminary action by and authority from the appropriate branch or board in Washington to authorize purchases.

From these numerous circulars providing authoritative procedure in the purchase of supplies generally, covering a wide field, there was no specific exception as to meat supplies for the troops, but they were never treated as applicable thereto. The necessities during the period of the war precluded such application.

The furnishing of adequate meat supplies for the Army was within the authority and duty of the Acting Quartermaster General and afterwards within his authority and duty as Director of Purchase and Storage. General Kniskern, as depot quartermaster at Chicago, was the authorized representative of the Acting Quartermaster General in the purchase of meat supplies and, while subject to any specific instructions which the Acting Quartermaster General might see fit to give him, his duty was to supply the needs, and specific authority as to each purchase was not required. There was in the office of the Quartermaster General a subsistence division, but the chief duty it exercised in the matter of the purchase of meats was to supply General Kniskern with such information as might be available as to future needs, leaving it to him to supply them. The authority of General Kniskern in connection with the establishing in Chicago of a packing house products branch of the subsistence division of the Quartermaster General's Office and in connection with his later appointment as zone supply officer appears in Findings V and VI.

VIII

On September 17, 1918, Capt. Jay C. Shugert, Quartermaster Corps, was, by authority of the Acting Quartermaster General, designated as purchasing and contracting officer for the packing house products and produce division of the office of the Depot Quartermaster at Chicago.

At this time the "packing house products branch of the subsistence division of the Quartermaster General's Office," created 53 on July 3, 1918, had jurisdiction over the purchase of packing house products here involved, subject to the control of the Quartermaster General, which division afterwards by transfer became a division of the office of the Director of Purchase and Storage.

On January 8, 1919, by Depot Order No. 323, the contract and inspection branches of the packing house products division (of the depot quartermaster's office) were "transferred to the packing house products branch, subsistence division, office of the Director of Purchase and Storage" to be "absorbed in the proper sections of that branch" and the packing house products division was "eliminated as a division of this depot."

By Change Order No. 31, dated January 9, 1919, Capt. Jay C. Shugert, Quartermaster Corps, and other named officers of that corps, were "relieved from further duty in the packing house products division and are assigned as assistants to the officer in charge packing house products branch, subsistence division, office Director of Purchase and Storage."

In an order of February 15, 1919, announcing assignments of officers, there appeared among others, the following paragraphs:

"Packing house products branch, subsistence division, office of Director of Purchase and Storage. O. F. Skiles, major, Quartermaster Corps, in general charge. J. C. Shugert, captain, Quartermaster Corps, in direct charge."

* * * * *

"Office service section. J. C. Shugert, captain, Quartermaster Corps, in charge."

* * * * *

IX

In supplying the needs of the Army for bacon and other packing-house products during the early stages of the war, the regular method of advertising for and receiving bids and letting contracts to lowest bidders, if otherwise satisfactory, was adhered to, but later on, in 1917 and during 1918, the needs had so grown and were so rapidly approaching the capacity of the packing plants that this method became impracticable, and the necessity for a constant and ever-increasing flow of supplies of this character made necessary the resort to other purchase and procurement methods.

The office of the depot quartermaster, afterward the zone supply officer, at Chicago was informed from time to time by the proper

authorities at Washington as to the number of men which would be in the service within stated times, and the duty devolved on the depot quartermaster of procuring supplies of the kind in question sufficient for the indicated number of men without the issuance of specific authorization to him in each instance to purchase or specific instructions as to quantities to be purchased. And because of the time required to cure, smoke, and can Army bacon, it was necessary to anticipate needs therefor.

The plan was adopted by the depot quartermaster at Chicago of calling into conference with him or his authorized assistant, from time to time, representatives of this plaintiff and the six other large

packing houses, at which conferences the packers' representatives were informed as to the needs of the Government for a

stated period, usually three months, sufficiently in the future to give time for manufacture, and asked to indicate what portion of the stated needs each would furnish. Upon receipt of the statements from the packers as to what quantities they would furnish, which were submitted in writing and usually within a few days after the conference, the depot quartermaster made an allotment to each packer and notified each as to the quantities it would be expected to furnish during each month of the period involved.

Only representatives of the large packers were called into these conferences because upon them chief dependence for adequate supplies must be placed, but the smaller packers were also called upon and as needs increased were urged to furnish as much as they could of their products.

X

Since there were many elements entering into cost of production as to which there were frequent fluctuations, it was not practicable to undertake to determine prices so far in advance, and accordingly, instead of fixing prices at the time the proposals were submitted, or notices of allotments issued, it was agreed that prices would be determined at or near the first of each month for the product to be furnished during that month. This was at a time when of necessity the preparation of the product, in this instance bacon, was well under way, approaching completion as to a large part thereof and when the cost of the green bellies, the basic element of final cost, and other fluctuating elements of cost were ascertainable.

At about this time the usual form of circular proposals were sent to the packers, not for use in submitting bids as under the peace-time competitive system, but as a convenient method for formal submission by the packers of their proposals as to price for the product which they had theretofore been directed to furnish during the month in question and which already, by direction of the depot quartermaster, was in process of preparation.

Upon submission of these proposals as to price, if the same were satisfactory to the depot quartermaster or, otherwise, upon adjust-

ment to a satisfactory basis, purchase orders were issued, which furnished the basis of payment, although the purchase orders frequently were not issued until a part and sometimes all of the product covered thereby had been delivered.

XI

The needs for bacon and other meat products rapidly grew as the number of men to be provided for increased, and early in 1918 it became apparent that capacity production on the part of the plaintiff and the other large packers would be required. They were accordingly informed at one of the conferences held that they would be expected to produce to capacity, a statement which was frequently repeated, and it was understood that the Army would need and would take capacity production until further notice. A survey was made of the packing plants to determine their capacity in order that it might be known whether they were producing to capacity.

55 The capacity of the plaintiff's plant to produce bacon was dependent on the quantity of hogs suitable for Army bacon which it might be able to buy, the capacity of its smokehouses, other necessary uses considered, and the capacity of its canning plant. From this time on and until it was directed to stop production the plaintiff attempted to give preference, in purchasing hogs, to those suitable for Army bacon; it devoted to smoking Army bacon all of its smokehouse capacity which it could, caring at the same time for other parts of the hogs requiring smoking, and devoted its canning equipment to the canning of Army bacon. It produced bacon to its capacity from April of 1918, during the remainder of that year, and the Government purchased and received from it all that it so produced. At times it produced more than had been called for during a particular period, and the depot quartermaster on being notified of this fact, modified purchase orders accordingly and took the additional production.

XII

On the 10th day of August, 1917, after the passage of the food control act, approved that day, 40 Stat. 276, the President by Executive order created the United States Food Administration and conferred upon it the powers and authority given him by said act, and authorized it to carry into effect the provisions thereof and directed all departments and established agencies of the Government to cooperate with it in the performance of its duties. By proclamation of October 8, 1917, he required all packers whose annual sales exceeded \$100,000 to obtain a license of the Food Administration as a condition of carrying on business after November 1, and on November 2, 1917, such a license was issued to the plaintiff.

Effective November 1, 1917, the Food Administration issued regulations applicable to all licensed packers, of which the plaintiff was informed, directing, among other things, that their books

should be kept as theretofore unless otherwise ordered, that they should be subject to examination by the Food Administration, that they should so conduct their business that their profits should not exceed 9 per cent of their investment, or 2½ per cent of their gross sales, and that they should make periodic reports of their business in whatever detail the Food Administration might direct. The plaintiff complied with these regulations, it continued to keep its books as theretofore, no instructions were received to adopt any other system, they were periodically examined, as often as 12 times in one year, by representatives of the Food Administration, and it was determined that plaintiff's profits during the period of control by the Food Administration did not exceed the prescribed limit.

XIII

On November 17, 1917, the Food Administration found and announced that "the demand for certain food commodities by the Army and Navy, neutral, allies, and civil population is greater than the supply of such commodities," that the shortage and the aggregation of buying in large quantities "has effectually suspended

56 the law of supply and demand as an effectual regulator of prices," that the normal purchase of these commodities in large quantities by bid and contract is not only impossible in some cases but raises the prices and stimulates speculation and that therefore it is vital that large purchases of certain commodities be made by allocations at fair prices, the Federal Trade Commission to determine costs of production, and proposed to the Army and Navy, in order to organize such a program, the appointment of a conference committee composed of the chief of the Food Administration Division of Coordination of Purchases, the Quartermaster General of the Army, the Paymaster General of the Navy, and a representative of the Federal Trade Commission, the committee to determine from time to time "which commodities are to be placed in the above category of 'allocated purchases,' the method of negotiation and principles of purchases." In the suggested plan it was provided that the Federal Trade Commission should determine costs, the committee should recommend a price, and that "the Army and Navy shall each be furnished with a memorandum showing the amount allocated to the manufacturer and the price, and they shall complete the purchase and attend to all matters of inspection, shipment, and payment."

Pursuant to this suggestion the food purchase board was organized, with the approval of the Secretary of War and the Secretary of the Navy, on December 11, 1917, constituted of the officials suggested, or their authorized representatives, and on May 8, 1918, the President formally authorized the organization of the Food Purchase Board to consist of a representative of the Secretary of War, the Secretary of the Navy, the Federal Trade Commission, and the United States Food Administration.

XIV

Under date of February 19, 1918, the following letter, which was afterwards communicated to the packers, plaintiff included, was written by the President to the Food Administrator, viz:

THE WHITE HOUSE,
Washington, 19 February, 1918.

MY DEAR MR. HOOVER: May I not call your attention to this important point:

There is pressing need of the full cooperation of the packing trade, of every officer and employee, in the work of hurrying provisions abroad. Let the packers understand that they are engaged in a war service in which they must take orders and act together under the direction of the Food Administration if the Food Administration requires.

Cordially and sincerely, yours,

WOODROW WILSON.

[SEAL.]

HON. HERBERT HOOVER,
Food Administration.

This letter was prepared by Joseph P. Cotton, a lawyer of New York, who, during the latter part of 1917 and the first half of 1918, was connected with the Food Administration without salary, 57 engaged particularly in looking after purchases and shipments of meats to allied countries. He was seeking cooperation between the packers as to which they seemed hesitant for fear of possible alleged breaches of the Sherman Act, and he conceived the idea that the difficulty might be removed if they felt that what he wanted them to do "was a governmental order by war authority."

XV

At a meeting of the Food Purchase Board held on July 16, 1918, it was concluded that on account of the shortage which had developed in canned meats and bacon these products should be placed on an allotment basis. On August 12, 1918, the depot quartermaster at Chicago was notified from the office of the Quartermaster General by the officer in charge of the subsistence division that it was understood that tinned meats, including tinned bacon and smoked bacon, would be allocated by the Food Administration, and he was requested to cancel orders which had been placed with the packers and ask allotments of the same from the Food Administration.

On August 16, 1918, General Kniskern, Depot Quartermaster, wrote to Swift & Co. as follows:

"1. Please cancel letter of this office of July 25, 1918, covering allotments on canned meats and bacon for the months of September, October, November, and December, 1918, as this depot is in receipt of advice from the office of the Quartermaster General stating these allotments will be made by the Food Administration.

"2. The Food Administration has been written to-day requesting they confirm the allotments made by this office for the above-mentioned months, as it is desired that these allotments remain the same as stated in letter of July 25. This is to be considered as a paper transaction until you receive confirmation from the Food Administration."

And on August 26, 1918, Maj. E. L. Roy, Quartermaster Corps, United States Army, in the name of the Food Administration, Meat Division, wrote Swift & Co. as follows:

"1. Under date of July 20, the depot quartermaster of the United States Army allotted you bacon issue. You were later informed that the allotment as made would be canceled and reallocated by the Food Administration.

"2. You are now informed that, after consultation with the depot quartermaster, Chicago, the Food Administration has allotted you product covered by the depot quartermaster's allotment of July 20 and that prices will be arranged monthly and as near the first day of each month as is convenient, these prices to cover deliveries during the month following.

"3. Any information you may desire in connection with details regarding these allotments should, in the future as in the past, be taken up with the depot quartermaster, Chicago.

On November 9, 1918, a conference was held on the call of General Kniskern at which he and Major Skiles, for the Government, were present and representatives of the seven large packers, including Swift & Co., for the purpose of providing allotments of bacon and other meat products for the months of January, February, and March, 1919. The quantity of bacon asked for for the three months stated was 60,000,000 pounds, 30,000,000 pounds each of Serials 8 and 10.

On November 12, 1918, Swift & Co. sent to the general depot of the Quartermaster Corps at Chicago the following communication:

SWIFT & COMPANY,
UNION STOCK YARDS,
Chicago, November 12, 1918.

WAR DEPARTMENT,

*General Depot of the Quartermaster Corps,
1819 West 39th Street, Chicago, Illinois
(Attention Maj. Skiles).*

GENTLEMEN: Referring meeting in your office Saturday, November 9th, please be advised we offer for delivery during January, February, and March, 1919:

and 17,500,000 lbs. serial 10 bacon
 4,000,000 lbs. serial 8 bacon

21,500,000 lbs.

We offer for delivery each month as shown under:

	Serial #10	Serial #8
January-----	6,000,000	1,400,000
February-----	5,500,000	1,200,000
March-----	6,000,000	1,400,000
Total-----	17,500,000	4,000,000

You will note we are offering a larger proportion of serial #10 than of serial #8 bacon. This because we have gone to great expense in equipping canning rooms at Chicago, Kansas City, and Boston on the understanding that you very much preferred serial #10 bacon to serial #8. The amount serial 10 given above is the minimum amount required to enable us to operate our canning rooms at fair capacity. If necessary we are willing to have our offers Serial 8 bacon increased and serial 10 decreased proportionately to the extent you find necessary bearing in mind that we will appreciate as liberal a proportion of serial #10 bacon as possible.

Will you kindly advise if we shall figure to put down above amounts for delivery as shown. After receipt of such advice we will furnish you with statement of amounts we will put in cure at each plant.

Yours respectfully,

SWIFT & COMPANY,
Per GES, Jr.

Prov. Dept. JH-JL

United States Food Administration License No. G-09753.

59 On November 26, 1918, the following communication was sent to the Chicago office of the Food Administration for the attention of Major Roy:

[War Department, office of the Quartermaster General, Packing House Products Branch, Subsistence Division, 1819 West 39th Street, Chicago, Ill.]

Subsistence.

431 P & S-PC.

NOVEMBER 26, 1918.

From: Officer in charge, Packing House Products Branch, Subsistence Division, office Director of Purchase and Storage.

To: United States Food Administration, 757 Conway Bldg., Chicago, Ill. Attention Major E. L. Roy.

Subject: Allotments—Bacon and canned meats.

1. In connection with the requirements of this office—canned meats and bacon—for the months of January, February, and March, 1919, you are requested, please, to make allotments to the various packers of the items in the quantities and for delivery as is indicated below:

Swift & Company, serial 10 bacon, January, 6,000,000 lbs.

Swift & Company, serial 10 bacon, February, 5,500,000 lbs.

Swift & Company, serial 10 bacon, March, 6,000,000 lbs.

(There follows names of 17 other packers followed by stated amounts of different products for each of the three months.)

2. It is requested that packers be informed at the earliest practicable date allotments made to them, in order, that they can make necessary arrangements for the procurement of tins, boxes, and other equipment, as well as to know the quantities of green product it will be necessary for them to put in cure during December to apply on later deliveries.

3. Please send copy of the official allotments to this office for our records.

By authority of the Director of Purchase and Storage:

A. D. KNISKERN,

Brigadier General, Q. M. Corps, in Charge.

By O. W. MENGE,

2nd Lieut., Q. M. Corps.

OWM:JDW.

On December 3, 1918, the Food Administration, by Major Roy, with the approval of the chief of the Meat Division, whose assistant he was, issued the following:

DEC. 3.

D. C. P. #8. 2187.

From: U. S. Food Administration, Meat Division, Swift & Com-

pany.

To: U. S. Yards, Chicago, Ill.

Subject:

1. On requisition of the Packing House Products Branch, Subsistence Division, office of Quartermaster General, 1819 W. 60 39th St., Chicago, Ill., you have been allotted for delivery during the month of—

Product	Quantity	Price
January, 1919, bacon serial #10.....	6,000,000 lbs.	To be determined later.
February, 1919, bacon serial #10.....	5,500,000 lbs.	
March, 1919, bacon serial #10.....	6,000,000 lbs.	

2. The above to be in accordance with Q. M. C. Form 120 and amendments thereto.

3. For any further information regarding this allotment apply to the Packing House Products Branch, Subsistence Division, office of the Quartermaster General, 1819 W. 39th St., Chicago, Ill.

UNITED STATES FOOD ADMINISTRATION,
MEAT DIVISION,
By E. L. ROY.

Major E. L. Roy, Quartermaster Corps, National Army, then a captain, was by orders of the Chief of Staff, dated July 22, 1918,

directed to proceed to Chicago and report to the depot quartermaster for assignment to temporary duty with the Food Administration. He became assistant to the chief of the Meat Division of the Food Administration in charge of the Chicago office of that division and remained with the Food Administration in that capacity until his resignation on December 10, 1918, following his discharge from the Army.

Two copies of this notice were sent to Swift & Co. on one of which was stamped the word "Accepted," followed by this instruction: "To be signed and returned to Meat Division, 11 W. Washington St., Chicago."

Swift & Co. indicated its acceptance by writing below the word "Accepted" the following: "Swift & Company, By G. F. S. Jr., 12/11/18," and returned this copy to the Food Administration. The price was left for later determination because of the possible fluctuation in the basic price, that is, the price of hogs.

A copy of this notice was sent to the packing-house products branch of the subsistence division, office of Director of Purchase and Storage, at Chicago, and on December 10, 1918, the following communication was sent to Swift & Co.:

[War Department, office of the Quartermaster General, Packing House Products Branch, Subsistence Division, 1819 West 39th Street, Chicago, Ill.]

DECEMBER 10, 1918.

Address reply to Depot Quartermaster. Marked for attention Div. 1-1-b, and refer to File No. 431.5 P&S-PC.

From: Officer in charge Packing House Products Br., Subsistence Div., office Director of Purchase and Storage.

To: Swift & Co., Union Stock Yards, Chicago, Ill.

Subject: Bacon Serial 10, January, February, and March.

1. In connection with the offers you made to this office on bacon, serial 10, for delivery during the months of January, February, and March, you will please find indicated below the schedule of deliveries this office requests you to make:

January	6,000,000 lbs.
February	5,500,000 lbs.
March	6,000,000 lbs.

61 2. In order that proper arrangements can be made and all concerned informed accordingly, you are further requested to advise this office by return mail where you contemplate putting up these allotments.

By authority of the Director of Purchase and Storage.

A. D. KNISKERN,
Brigadier General, Q. M. Corps,
Officer in Charge.

By O. W. MENGE,
2nd Lieut. Q. M. Corps.

OWM:MJB

Serial No. 10 bacon was bacon prepared according to Army specification which was packed in cans, the cans being then packed in boxes. Serial No. 8 differed in that it was packed in boxes but not canned.

XVII

It had been the practice of Swift & Co. to give its hog buyers in various markets standing instructions from time to time as to the purchase of hogs and the grades which should predominate therein and to supplement these instructions each morning by telegraph. Previous to the conference of November 9, 1918, and during the period that it had been engaged in furnishing Army bacon during the war these buyers had been instructed to give preference in buying to hogs suitable for its production. At the time of this conference it had on hand sufficient bellies to complete its December deliveries, but when informed of the Government's needs for January, February, and March its instructions to its buyers in the respects stated were permitted to stand. November 9 was Saturday, and on Monday, the 11th, its buyers bought hogs under former instructions at South Omaha, St. Joseph, and Kansas City, which were slaughtered on November 12 and produced 600 pieces of Army bellies which were cured, smoked, and canned and applied on January deliveries. Purchases continued daily, Sundays and holidays excepted, the suitable bellies from which were prepared for January and February deliveries and on January 13, 1919, the first bellies were put in cure for March, 1919, delivery.

XVIII

On January 24, 1919, the following communication was sent to Swift & Co.:

[War Department, General Supply Depot, U. S. Army, Zone Seven, Packing House Products Branch, Subsistence Division, Office Director Purchase and Storage, 1819 W. 39th St., P. O. Lock Box 00, Chicago, Ill.]

Refer to File No. 431.5-PH. Div. 1.

JANUARY 24, 1919.

From: Zone Supply Officer, Zone Seven Packing House Products Branch. Subsistence Division, Office Director Purchase and Storage.

To: Swift & Co., Union Stock Yards, Chicago, Ill.

Subject: Packing-house products.

1. Due to the large quantities of bacon, corned beef, roast beef, and corned-beef hash now on hand, and in view of the fact that the
62 Army is rapidly being demobilized and the demand constantly decreasing, you are informed that this office will not be in the market for any of the above-mentioned products for delivery during the month of March, 1919, except as hereinafter stated.

2. Such quantity of bacon as is now in process of cure, over and above the quantity necessary to take care of February awards, and which has been passed by inspectors of this office, will be accepted.

3. This information is furnished you for the purpose of giving as much advance notice as possible of the intentions of this office, in order that you may take such steps as you may deem necessary toward the reconstruction of your commercial trade.

4. There is at present no likelihood of any further purchase of the products mentioned for several months.

5. Please accept the sincere thanks of this office for the hearty and loyal cooperation your firm has so generously given in the past, without which the difficulties of securing sufficient meat foods for the Army would have been well-nigh unsurmountable.

By authority of the Director of Purchase and Storage.

A. D. KNISKERN,
Brigadier General, Q. M. Corps,
Zone supply Officer.

O. F. SKILES,
Major, Quartermaster Corps.

OFS-JW

Copies sent. E. F. S., G. F. S., Jr., H. H. S., F. J. K., W. S. J., J. E. M.

January 24, the date which this notice bore, was Friday, and the following day, Saturday, was a half holiday at the Swift plant. This notice was received by Swift & Co. on January 27, upon the receipt of which they immediately ceased to put bacon in cure, but proceeded with the curing, smoking and canning of that already in cure. They at once notified Squire & Co., by telegraph, to cease putting bacon in cure but to proceed with the curing, smoking, and canning of the bacon already in cure. This notice was received by Squire & Co. on January 28, and was immediately complied with.

XIX

On March 5, 1919, but erroneously under date of February 5, 1919, another notice was sent by General Kniskern to Swift & Co., reading as follows:

[War Department, General Supply Depot, U. S. Army, Zone Seven, Packing House Products Branch, Subsistence Division, Office Director Purchase and Storage, 1819 W. 39th St., P. O. Lock Box 00, Chicago, Ill.]

Refer to File No. 431.5-PH. Div. 1.

FEBRUARY 5, 1919.

From : Zone Supply Officer, Zone 7, Packing House Products Branch, Subsistence Division, Office Director Purchase and Storage.
To : Swift & Co., Union Stock Yards, Chicago, Illinois.
Subject : Extension of delivery date on packing-house products.

1. You are informed that the date of delivery on corned beef, roast beef, corned-beef hash, and issue bacon, which your contracts

63 required you to have completed by February 28, 1919, has been extended to permit delivery on or before March 31, 1919.

2. You are further advised that none of the above-mentioned commodities over and above the quantities noted on February contracts will be required by this office. It will therefore be necessary for you to discontinue production immediately on such commodities which are not intended to apply against the February contract. Should, however, you have any issue bacon which is now in smoke and which is in excess of the amount required for February delivery, same will be accepted. Under no condition will any more bacon be placed in smoke for this office.

3. It is the intention of this office to enter into negotiation with your firm with a view of making settlement for such material as you now actually have on hand which can not be utilized after completion of the February contract.

4. It will not be necessary to communicate with this office either in person or by correspondence with a view to making any arrangements other than those outlined herein.

5. As soon as possible this office will call upon you for certain information, upon receipt of which negotiation will begin. In the meantime, you are instructed to use every effort to dispose of such material as you now have on hand, in order that adjustment may be quickly made. This office will proceed with this work as rapidly as is consistent with other business connected herewith.

By authority of the Director of Purchase and Storage:

A. D. KNISKERN,
Brigadier General, Q. M. Corps,
Zone Supply Officer.
O. F. SKILES.

OFS-JW.

This notice was received by Swift & Co. on March 6, and immediately upon its receipt they ceased putting bacon in smoke, but proceeded to complete the smoking and canning of bacon which was already in smoke, and by telegraph notified Squire & Co. to do likewise, with which instructions Squire & Co. complied.

XX.

The process in the preparation of Army bacon under Army specifications were different from those applicable to the manufacture of commercial bacon, and required more time. The bellies were first trimmed according to specifications and were better trimmed than is usual with commercial bacon. They were then carefully piled in a curing mixture of dry salt, sugar, and saltpeter in prescribed proportions. Commercial bacon was ordinarily cured in a sweet pickle. Army bellies were required to be overhauled on about the seventh day after first placed in cure, the overhauling

consisting of repiling and the application of additional curing mixture which by reason of change of position of the pieces and the application of the additional mixture facilitated the curing process. They were to remain in cure for 30 days or for such additional time as might be required for a thorough cure. The pieces were then freed from loose salt and hung. They were allowed to dry
64 for one day, after which they were put in smoke and required to remain in smoke for at least eight days, after which they were permitted to hang until cool and firm before packing. No. 10 Serial was packed in cans containing 12 pounds net, and the cans were boxed six to the box. Commercial bacon usually remained in smoke but about two days, and as a result of the processes Army bacon tasted more of salt and smoke than commercial bacon.

XXI

In April, 1918, when the plaintiff and the other large packers were being urged by the depot quartermaster at Chicago to produce more Army bacon, Swift & Co. arranged with Squire & Co., operating a packing plant at Boston, the stock of which company was very largely, at least in excess of 90 per cent, owned by the Swift family, to manufacture bacon on its account, Squire & Co. to be paid by Swift & Co. therefor the price paid Swift & Co. by the United States for Boston delivery, then 50 cents per hundred more than for Chicago delivery, less one-half of 1 per cent. This arrangement was effective beginning in April, 1918, and continued throughout the period here involved. It was at all times known to General Kniskern and Major Skiles. The capacity of the Squire plant was included, with the knowledge of Major Skiles, in the report made to him at his request by Swift & Co. as to its capacity for bacon production. Government inspectors were maintained in the Squire plant during the production of Army bacon therein, and the bacon produced in the Squire plant was marked "Prepared for Swift & Company."

XXII

For the months of September, October, November, and December of 1918 the prices of Army bacon were fixed by the Food Administration, but they were not fixed at the time the allotments were made because of the fluctuating elements entering into cost of production. Allotments were made with the notation thereon "Price to be determined later" and the prices for each month were determined on or about the first of the month. Prices were determined on the basis of ascertained cost of production with a profit added within the limits fixed in the Food Administration's license regulations.

On November 7, 1918, the chairman of the packers' committee was requested by the Food Administration to make an investigation and report as to the cost of producing Army bacon, which was done

through a subcommittee which submitted its report on November 9, 1918, accompanied by a detailed statement of costs, and recommended therein a price of \$50 per hundred for Serial 10 bellies, f. o. b. Chicago and Missouri River points with an addition of 70 cents per hundred for Boston delivery. Upon receipt of this report and after conference with the committee, the meat division of the Food Administration, by Major E. L. Roy, on November 9, notified General Kniskern's office, for the attention of Major Skiles, that prices as above stated had been fixed for November deliveries and the same prices were afterward authorized for December deliveries.

The prices for October had been \$50.93 f. o. b. Chicago and
65 \$51.63 f. o. b. Boston and for September \$50.30 f. o. b. Chi-
cago and \$51 f. o. b. Boston.

Soon after the armistice the Food Administration began to "taper off" its activities in various directions, adopting a program of discontinuance of its activities as early as possible. It made no further allotments of meat products, and fixed no price for bacon after that for December delivery.

On December 16, 1918, General Kniskern was instructed by telegraph as follows:

DECEMBER 16, 1918.

Brig. Gen. A. D. KNISKERN,
Chicago, Ill.:

Effective with January requirements, the Army will purchase packing-house products independently of Food Administration.

This office is notifying Food Administration accordingly. You are authorized to proceed on this basis. Please wire acknowledgement.

WOOD, *Subsistence, BAKER.*

Thereafter prices for January and February deliveries were determined as they had been during the earlier months of 1918 before that function came to be exercised by the Food Administration.

On December 19, 1918, the depot quartermaster, the Zone Supply Officer, sent to Swift & Co. a circular proposal requesting it to propose thereon the price for January deliveries and on January 7, 1919, sent it another circular proposal asking it to propose thereon prices for February deliveries, informing it in each instance that it was to propose a price only on the quantities previously awarded it for those months.

The price proposed and agreed upon for January delivery was \$49.52 per hundred for Chicago and Kansas City delivery, and \$50.22 per hundred for Boston delivery, and for February delivery it was \$50 per hundred for Chicago and Kansas City, and \$50.70 per hundred for Boston. January deliveries were completed on February 11, and February deliveries were completed on March 3. A purchase order for January deliveries was issued under date of January 4, 1919, but for some reason not appearing was canceled and another issued under date of February 10, 1919, the date borne by the

contract hereafter referred to, and a purchase order for February deliveries was issued under date of February 4. Formal contracts were thereafter executed. There were three contracts covering January deliveries, one each for Chicago, Kansas City, and Boston delivery, each executed by "J. C. Shugert, Quartermaster Corps, U. S. Army," described in the contracts as the contracting officer, and by W. W. Sherman, assistant treasurer, for Swift & Co., each dated as of February 10, 1919, approved by the Director of Purchases and the Board of Review February 26, 1919, and executed by Swift & Co. March 8, 1919. For February deliveries there was one formal contract covering Chicago, Kansas City, and Boston deliveries, executed by Capt. J. C. Shugert as contracting officer "as of the fourth day of February, 1919," approved by the Director of Purchases and the Board of Review March 1, 1919, and executed by Swift & Co. March 12, 1919.

Before the time had arrived, under the usual practice, for the transmission to the plaintiff of blank proposals for the submission of the price for bacon for March deliveries, the action indicated by the letter of February 5, 1919 (Finding XIX), had been taken, and there was no submission to the plaintiff of any circular proposals with request for price on March deliveries, there was no price submitted, and no purchase order issued.

XXIII

When the notice of March 5, 1919 (Finding XIX), was received by Swift & Co. they had already put in smoke for March delivery bacon which when completed and canned weighed net 4,197,672 pounds, of which 3,328,776 pounds was prepared by Swift & Co., and 868,896 pounds by Squire & Co. for account of Swift & Co. Of the 3,328,776 pounds put up by Swift & Co., 643,065 pounds was cured, smoked, and canned at its Chicago plant, 498,004 at its Kansas City plant, and 2,187,707 pounds was cured and smoked at other plants of Swift & Co. where there were not canning facilities and shipped to and canned at the Chicago plant. This bacon was put up under Government inspection.

When the order above referred to was received and pursuant thereto putting of bacon in smoke ceased there remained in process of cure, not needed to complete February deliveries and intended for March delivery, 1,068,539 pounds of bellies of which 417,881 pounds were in preparation by Swift & Co., and 650,658 pounds by Squire & Co. for the account of Swift & Co.

These bellies were under Government inspection during the laying down and regular overhauling thereof, and regular Government inspection during the smoking and canning processes continued until about March 10, when it was about to be withdrawn but was continued until the completion of the smoking and canning, at the request of Swift & Co.

XXIV

The 417,881 pounds which were yet in cure at the Swift plant when instructions were received to put no more in smoke, were put in cure from January 20 to January 27, inclusive, and were withdrawn from cure from April 11 to April 23, inclusive, an elapsed time of from 78 to 86 days. During that period these bellies were overhauled once in addition to the regular overhauling required at about the seventh day, the second overhauling taking place approximately 10 days after the receipt of the order to put no more in smoke, and when withdrawn from cure in April they were in good condition.

The condition of Army bellies in cure was not always determinable on the basis of the length of time they had been in cure but in the absence of other evidence of unfitness they were regarded as fit for smoke at any time within 60 days after put in cure.

After the depot quartermaster at Chicago, by order of July 3, 1918, was given the direction and control of the packing-house products branch of the subsistence division of the Quartermaster General's Office, Major George A. Lytle, who was the chief Army inspector at the Swift plant, assumed, by authority, direction of all inspection of meat supplies purchased by that branch in different parts of the country and as a result of a discussion as to how long bacon might remain in cure and still be acceptable under the specifications, 67 an agreement was reached and the following letter sent out to all inspectors except such as were in Chicago who were notified personally:

WAR DEPARTMENT,
GENERAL DEPOT OF THE QUARtermaster CORPS,
3615 Iron Street, Chicago, Ill., August 3, 1918.

No. 431.5 PH-I.

From: Depot Quartermaster, Chicago, Ill. (packing-house products division, inspection branch).

To: All meat inspectors.

Subject: Inspection of bacon.

1. It is desired that you get in touch with the packing-house officials and check up on the laying down and curing of issue bacon with the idea of having all bacon smoked before it becomes over 60 days old. After the cured bacon now in the cellars has been smoked you will avoid, if possible, the smoking of any bacon that has been in cure over 60 days.

A. D. KNISKERN,

Colonel, Quartermaster Corps, Depot Quartermaster.

By GEO. Y. LYITLE,

Veterinary Corps.

XXV

On March 7, 1919, Swift & Co. wrote the General Supply Depot office of the Director of Purchase and Storage, at Chicago, as follows:

"GENTLEMEN: We are in receipt of your letter of March 5th under the above caption. We offer for delivery during March from—

Chicago----- 2,800,000 lbs. bacon, issue serial #10, @ 50¢ f. o. b. Chicago.
Kansas City----- 500,000 lbs. bacon, issue serial #10, @ 50¢ f. o. b. K. C.
Boston----- \$30,000 lbs. bacon, issue serial #10, @ 50.7¢ f. o. b. Boston.

Total ----- 4,130,000 lbs.

"All of the above product was in smoke or in cars waiting to be canned when we received your letter of March 5th. We presume you will issue purchase orders promptly.

"For your information, we have in cure at Chicago 410,000 lbs. and at Boston 675,000 lbs. cured Army trim bellies which were put down under Food Administration allotment and previous to January 24th, at which time you instructed us to discontinue putting in cure."

And again on March 14, 1919, "confirming conversation," Swift & Co. again informed the General Supply Depot as to the quantities of serial #10 bacon it had for delivery in March, stating quantities and prices as above, and again on the same date wrote stating, among other things, that inability to make deliveries for March was blocking up its facilities and requesting that deliveries be permitted.

In reply General Kniskern, zone supply officer, wrote Swift & Co. as follows:

"1. Reference letter your office March 14, 1919, you are informed that it will be impossible for this office to receive any bacon
68 for which purchase orders have not been prepared, and as soon as agreement is reached as to price and purchase orders have been prepared, shipping instructions will be furnished.

"2. In reply to paragraph two, attention is invited to paragraph two of letter this office March 5th, 1919."

On March 22 Swift & Co. wrote the General Supply Depot, Officer Director of Purchase and Storage, repeating its statement of March 7 as to quantities of serial # 10 bacon on hand for March delivery and proposed price, and saying, "At the present time we have these amounts practically all packed and ready for delivery. We are very short of storage room at each of these plants and will appreciate you giving us purchase order and shipping instructions in the very near future."

XXVI

On April 24, 1919, General Kniskern, zone supply officer, wrote Swift & Co. stating that his office was taking preliminary steps toward an adjustment for materials on hand to be applied against March deliveries, which allotments were canceled, and requesting that a representative of Swift & Co. should be present at a conference to be held at his office on April 29, 1919, "in order that you may be fully informed as to what methods should be followed by your firm in submitting your claim."

On April 29, 1919, General Kniskern, zone supply officer, by Major Skiles, his assistant, wrote Swift & Co., inclosing papers "necessary to prepare in order to file a claim for any amount you may consider due from the various packing house commodities allotted you for delivery during March, 1919, and on which you will suffer a loss by reason of cancellation of those orders." The letter directed also that the claim should be filed before June 30, 1919.

On August 29, 1919, General Kniskern, zone supply officer, wrote Swift & C' as follows:

"1. Regarding your claim for the value of bacon prepared by you under allotment given by this office of November 9, 1918, and in view of the fact that this claim is still awaiting action of the Board of Contracts Adjustments in Washington, I desire to state the following:

"2. Until the award on this claim has been assigned to this office for the purpose of conducting negotiations with you as to the manner in which the informal contracts shall be adjusted, it will be impossible for this office to give you positive and definite instructions as to the disposal of any of this product which may at this time be in your possession. It is, however, realized by this office that the product in question is of a perishable nature. Further, it is an important food product. In view of these two facts, it is believed that these products should be disposed of at the earliest possible moment. It will not be possible for the Government to dispose of them until the negotiations are completed and the actual ownership determined by the Government, taking them at the agreed price or turning them over to you on a basis similar to the salvage basis of unfinished material.

"3. In the judgment of this office, if you are able to dispose of this product by a sale within the limits of the United States,
69 it would be a perfectly proper procedure, bearing in mind, of course, that having made such sale it will be necessary for you, when the later negotiations are in progress, to be able to convince a negotiating officer that the price you may have received for such part of this product as has been sold was justified by the conditions.

"4. In order that you may have some basis on which to proceed, in case you decide to attempt a sale of these products, you are informed that this office, under authority from Washington, is now selling, through the parcel post and to individuals, bacon, serial 10, at \$4.15 per can, or about 34 $\frac{1}{2}$ cents per pound.

"5. Any sales that you may make at the price which is now being charged through the parcels post and to individuals would, in the judgment of this office, be entirely in the interests of the Government.

"6. It is suggested that you make an endeavor to secure more definite information from the office of the Director of Purchase and Storage with reference to the sale by you of the above-mentioned supplies."

XXVII

On September 15, 1919, Lieutenant Colonel Clarke, zone storage officer, in response to a request of the Board of Contract Adjustment for a verification of the quantity of serial No. 10 bacon involved in the claim of Swift & Co., then pending before the board, reported that as checked by his office there was 58,301 cases. This number of cases was equivalent to 4,197,672 pounds of bacon, net.

XXVIII

In September, 1919, after a lengthy investigation for the purpose of determining whether it might be advantageously sold abroad, Swift & Co. began selling the serial No. 10 bacon it had prepared for March deliveries, in the United States, at wholesale, through its branch houses and its car route selling department. It had no facilities for marketing this product at retail.

At the same time other packers were putting on the market bacon of the same character left on their hands and the United States was selling a large surplus of the same product. The United States began selling this product at retail through quartermaster's stores, department stores, by parcel post, and otherwise, at \$4.15 per can, amounting to 34 $\frac{1}{2}$ cents per pound.

When Swift & Co. began sending out bacon in carload lots to its branch houses for sale, it did so with instructions to its representatives to sell at \$4.02 per can, a price designed to permit the retailer to sell at the Government's price and realize a profit for the handling of approximately 1 cent per pound. Its sales through its car routes were on the same basis. Instructions sent out informed its representatives that the Government was selling at \$4.15 per can and added, "it is desirable, therefore, that no dealer sell for less than this." Instructions also informed its representatives that this bacon was the subject of a claim against the United States and directed that an accurate record be kept of each sale and the price at which sold.

Subsequently and from time to time the Government reduced its price on Army bacon and the plaintiff followed the Government's price in its sales except that in a few localities it was

able to procure a better price by reason of its ability to make prompt delivery which the Government could not do. The lowest price realized was \$2.65 per can or 22 $\frac{1}{2}$ cents per pound, which was at or near the end of the period covered by these sales. The sale of the bulk of this product, approximately 98 $\frac{1}{2}$ per cent thereof, was completed in January, 1920, although there were sales of about 700 cases in February and sales of small quantities ranging from 1 case a month in each of three months to as high as 60 in one month and 75 in another month, until October, 1920, during which month the last was sold.

During the earlier part of the year 1919, beginning in the month of January and continuing into or through the month of July, the price of hogs was constantly increasing. In August the price commenced to decline and the decline continued into the month of January, 1920. The advance and decline in the price of hogs during this period, due largely to British buying, was reflected to a greater or less extent in different commercial pork products, more particularly such as were customarily shipped to England including side meats, long-cut hams and square shoulders. The cuts from which bacon was manufactured were not ordinarily exported and the extent to which the price of commercial bacon or Army bacon was influenced by the condition recited is not definitely shown. During this period of rising prices as stated above, Swift & Co. were manufacturing and selling commercial bacon in the usual course of business. Army bacon was not a commercial product and not readily salable as such.

The quantity of serial No. 10 bacon accounted for by plaintiff is 58,301 $\frac{1}{3}$ cases, or 4,197,696 pounds, an excess of one-third case, or 24 pounds, over the quantity ascertained to be on hand as shown in Finding XXVII. For this bacon, sold at varying prices, the plaintiff received \$1,062,847.54.

XXIX

In computing its claim the plaintiff deducts from the amount received for the sale of this bacon, as shown in the next preceding finding, expense of sale in the amount of \$160,982.23, itemized as follows:

Transportation expenses	\$21,328.72
Selling expenses	40,388.21
Storage charges	22,254.13
Insurance	4,171.09
Interest	71,765.28
Miscellaneous	1,074.80
 Total	 160,982.23

The first item, "Transportation expenses," represents the total of the railroad expense bills on all shipments of the bacon in question to branch houses and on car routes.

The second item, "Selling expense," represents the estimated expense incurred by the branch houses in handling and disposing of this bacon. Plaintiff company had between three and four 71 hundred branch houses. From the detailed reports of each of these branch houses as to their operating expenses and their sales the precentage which expenses bore to gross sales was ascertained and the proportion of expense which these bacon sales bore to the gross sales was allocated to the bacon sales and charged as the expense thereof.

The third item, "Storage charges," was the warehouse charges for the storage of a portion of this bacon in Kansas City before it was

shipped out for sale. It was computed upon the basis of Chicago warehouse charges, but the warehouses in which it was stored were in fact owned by the plaintiff company. The charge is excessive.

The fourth item, "Insurance," was the cost of insuring this bacon during the period between the completion of its manufacture and its sale.

The fifth item, "Interest," is interest computed on the cost of this bacon from March 31 to November 1, 1919; March 31 being taken as the date of the completion of its manufacture and November 1 being taken as the average date of the shipments to the branch houses.

The sixth item, "Miscellaneous," represents the cost of labor in loading the bacon into the cars, with which is included an expenditure, the amount of which is not shown, for printed cards which were distributed to the consumers of this bacon, instructing them how to make use of it.

XXX

The salt bellies which were in cure when the order was received to put no more in smoke were sold in the United States, Belgium, Norway, Germany, and France. Sixty-five thousand two hundred and twenty-five pounds were sold in the United States, of which there was sold to F. A. Cott, New York delivery, on May 5, 1919, 29,566 pounds at 34 cents per pound; on May 31, 1919, 1,834 pounds at 34 cents per pound, less one-half of 1 per cent; and on May 31, 1919, 25,500 pounds at 34 cents per pound, less half a cent per pound, the stated deduction representing a discount for cash; and in April there had been shipped to plaintiff's St. Louis plant 8,325 pounds, which was there lightly smoked and sold through its southern territory, netting 31 cents per pound, and making total receipts of \$21,796.13 for the 65,225 pounds, an average price of 33.416+ cents per pound. The 56,900 pounds sold to Cott were shipped from the Squire plant, the 8,325 pounds from plaintiff's Chicago plant.

All the remainder of the salt bellies were shipped abroad and were sold in the countries and in the amounts and for the prices indicated in the following tabulation:

Where sold	Boxes	Net weight	Gross amount realized	Gross per pound	Deductions	Net amount realized	Net per pound
Belgium-----	50	Pounds	Cents				
Norway-----	30	28,707	88,942.91	31.15	\$685.28	\$8,257.63	28.76
Germany-----	238	18,000	5,650.05	31.38	635.38	5,014.67	27.85
France-----	1,498	135,985	54,394.00	40.00	5,512.26	48,881.74	35.94
Total-----	1,816	820,622	135,906.15	16.56	34,937.49	100,968.66	12.30
					41,770.41	163,122.70	

72 The above figures show an excess of deductions in the sum of \$506.84 and an excess of receipts of \$597.04 over the figures indicated by plaintiff's submitted tabulation, a net excess of receipts in the sum of \$90.20. The facts are found as indicated in the tabulation predicated upon the detailed testimony.

The deductions shown above were on account of inland freight charges, ocean freight charges, marine and war risk insurance, and handling and selling expenses abroad. In addition to these expenses, the expense to the plaintiff of boxing this bacon for shipment was \$8,014.04.

The shipment to Belgium was made to Victor Relecom on June 3, 1919, and arrived in Belgium June 17, 1919; the sale was made September 2 and 9, 1919.

The shipment to Norway was made on June 27, 1919, and sold to Goossens and V. Roosen, 5 boxes, and to F. W. Holst, 25 boxes, in October.

The shipment to Germany was to Swift & Co. at Hamburg, on June 10, 1919, received there July 18, 1919, and sold in August.

The shipments to France were to Swift & Co., in different lots as follows: To Bordeaux, on April 1, 1919, 200 boxes sold in June, July, August, September, October, and November, 1919; to Bordeaux, on April 18, 1919, 375 boxes, sold in November and December, 1919, and January, 1920; to Marseille, on April 26, 1919, 807 boxes, sold in July, August, September, and October, 1919; to Marseille, on May 13, 1919, 116 boxes, sold in September and October, 1919, and January, 1920.

Swift & Co. had theretofore, in ordinary course of business, exported similar products in large quantities, and believed that at this time it would find a good market because of the reported shortage of food products, and with these exportations it shipped largely of other products on which it sustained heavy losses.

XXXI

The cost of producing the 3,328,776 pounds of Serial No. 10 bacon which was prepared by Swift & Co. (Finding XXIII) for March delivery was \$48.07 per hundred pounds, amounting for that entire quantity to \$1,600,142.62.

A reasonable profit, within the limits provided by the regulations of the Food Administration then in force and applicable to this plaintiff as a licensee, was \$40,003.56.

A fair contract price for said bacon on the basis upon which prices had theretofore been fixed and the basis upon which it was contemplated by the parties that the price for this bacon would be fixed was \$1,640,146.18.

The cost to the plaintiff of the 868,896 pounds of Serial No. 10 bacon put up by Squire & Co. for the account of the plaintiff, on the basis of costs above stated with 50 cents per hundred additional for Boston delivery and on the basis of agreement between the plaintiff and Squire & Co., was \$430,410.48, and the fair contract price therefor as between the plaintiff and the United States on the basis above stated as within the contemplation of the parties was \$432,573.34.

The cost to Swift & Co. of the 417,881 pounds of bellies which remained in cure when they were directed to put no more in
73 smoke was \$37.41 per hundred pounds, a total of \$156,329.28, and the cost to Squire & Co. of the 650,658 pounds of bellies which they had in cure at the same time and for which Swift & Co. was liable to Squire & Co. was \$243,411.15, computed at the same cost per pound. The reasonable profit accruing to Swift & Co. if they had been permitted to complete and deliver said 417,881 pounds of bellies would have been \$5,021.90.

The reasonable profit accruing to Swift & Co. if completion and delivery of the 650,658 pounds of bellies in the Squire & Co. plant had been permitted would have been \$7,819.28, for all of which it would have been obligated to Squire & Co. except \$39.09.

The reasonable additional profit accruing to Swift & Co. if it had been permitted to manufacture and deliver Serial No. 10 bacon up to 6,000,000 pounds for March delivery would have been \$8,818.30.

XXXII

Swift & Company had on hand materials for the completion of the manufacture, curing, and boxing of 6,000,000 pounds of serial No. 10 bacon for March delivery, the cost of which was \$6,357.81, and the salvage value of which was \$4,239.76, a difference of \$2,118.05.

XXXIII

All bacon supplies by the plaintiff for the months of September, October, November, and December, 1918, and January and February, 1919, which is the basis of the defendant's counter claim herein, were covered by purchase orders and that supplied in January and February, 1919, was also covered by formal contracts executed as set out in Finding XXII. The quantities called for in the purchase orders and contracts were delivered and accepted and were paid for at the price named therein and no one having to do with these transactions for the United States made any question as to unfairness of price or as to quality of the product all of which had been put up under Government inspection.

Previous to September, 1918, prices had been determined about the first of each month, when the product for that month's delivery was already well under way, by the submission by Swift & Company of a proposed price and its acceptance or adjustment to satisfactory basis by General Kniskern or by Major Skiles acting for him. Under other procedure indicated in the findings, the prices for September, October, November, and December, 1918, were fixed by the proper division of the Food Administration, and because of that body's ceasing to function in that respect after December prices were fixed, the price for January and February, 1919, were fixed as had been done before September, 1918, and evidenced both by purchase orders and contracts.

The price paid the plaintiff and the prices paid by the United States for all bacon purchased from all sources had increased in an approximately regular progression from January to August, in which month the average price paid the plaintiff was \$48.85 per hundred and the average price paid by the United States for all bacon bought from all sources was \$49.18. For the six months in question from September, 1918, to February, 1919, inclusive,

74 the plaintiff was paid \$50.30, \$50.93, \$50, \$50, \$49.52, and \$50 Chicago delivery, an average of \$50.125 per hundred and the

United States paid for all bacon of the kind in question from all sources \$50.1297, \$51.2309, \$50, \$50, \$49.69, and \$49.5607, an average of \$50.1297 per hundred.

It is not shown by the testimony of any witness having to do, for the Government, with the fixing or approving of prices for the six months in question, and four such witnesses have testified in the case, that they or any of them at any time regarded the prices fixed as in any wise unfair or that they were in any manner misled or deceived or deprived of access to desired information bearing thereon.

It is not shown to the satisfaction of the court that improper or illegal charges were presented by the plaintiff to the defendant on account of Army bacon delivered from September, 1918, to February, 1919, both inclusive, as declared in the counterclaim, or that any such charges were by mistake paid by the defendant to the plaintiff.

It is not shown that any deception, misrepresentation or concealment was practiced by the plaintiff to the detriment of the defendant in the matter of the settlements made for bacon furnished during the months in question and it does not appear that justice requires the opening of the settlements made for those months.

XXXIV

This action was commenced January 7, 1921. The plaintiff closed its case, that is gave notice that it had completed the taking of its testimony in chief, on January 24, 1922. The defendant took testimony and the plaintiff closed its case in rebuttal on November 13, 1922. Between December 6, 1922, and January 27, 1923, the defendant took testimony in surrebuttal. On February 10, 1923, the plaintiff filed its requests for findings of fact and brief. On April 30, 1923, the defendant was ordered by the court to file its request for findings and brief on or before June 1, 1923. On June 2, 1923, the defendant, not having complied with the order of the court, filed a motion for leave to file a counterclaim. The motion was allowed and the counterclaim was filed June 11, 1923.

CONCLUSION OF LAW

Upon the facts found, the court concludes as matter of law that the plaintiff is entitled to recover as follows:

For the cost to it of 3,328,776 pounds of serial No. 10 bacon at \$48.07 per hundred pounds (Finding XXXI)-----	\$1,600,142.62
For profit thereon at 2½%-----	40,003.56
	<hr/>
Total, being determined contract price-----	1,640,146.18
For cost of 868,896 pounds of serial No. 10 bacon put up by Squire & Co. for account of plaintiff at \$48.57 per hundred pounds (Boston delivery)-----	422,022.78
For profit thereon at 2½%-----	10,550.56
	<hr/>
Total, being determined contract price-----	432,573.34
Less gross proceeds of sale of all of said bacon-----	1,062,847.54
From which is deducted allowed expenses of sale-----	62,791.73
	<hr/>
Leaving net proceeds-----	1,000,055.81
	<hr/>
75 For cost of 65,225 pounds of salt bellies at \$37.41 -----	24,400.67
Less receipts from sale thereof-----	21,796.13
	<hr/>
For cost of materials, less their salvage value (Finding XXXII)-----	2,604.54
	<hr/>
	2,118.05
	<hr/>
	1,077,386.30

(NOTE.—For further explanation see opinion.)

The court concludes further that except as above stated, the plaintiff is not entitled to recover.

The court concludes further that the defendant is not entitled to recover on its counterclaim herein.

It is therefore considered and adjudged that plaintiff have and recover of and from the United States the sum of one million seventy-seven thousand three hundred and eighty-six dollars and thirty cents (\$1,077,386.30).

OPINION

DOWNEY, Judge, delivered the opinion of the court.

The plaintiff seeks recovery, on different theories, because of the refusal of the United States to accept and pay for certain Army bacon prepared for delivery during the month of March, 1919. The defendant disputes liability on any of the asserted theories and counterclaims because of alleged overpayment for bacon delivered during the preceding six months and paid for.

There are practically three theories declared upon in the petition although there are subdivisions of two of them by reason of declaration upon somewhat different facts, resulting really in a petition in five counts. The three theories briefly stated are, first, on informal contract under the Dent Act; second, on contract under the general jurisdiction of this court; and, third, for just compensation on the theory of delivery under a compulsory order, in effect a commandeering.

It may not be inappropriate to suggest in the beginning the difficulty encountered in attempting to treat this case concisely, either as to findings or opinion, a difficulty partially apparent from the

mere statement that we deal with a record of more than 3,000 printed pages. There are nearly 500 pages of orders, regulations, circulars, letters, etc., entailing a task of difficulty to bring into the findings such as may be essential to a fair presentment of the case and avoid the necessity of discussion of very many which do not aid a conclusion. We have felt justified, in the interest of a fair degree of clarity and brevity, in excluding much of this matter from the findings without obligation to first include it and then demonstrate by detailed discussion its immateriality.

It goes as a matter of common knowledge that in the ordinary course of events contracts for army supplies such as are purchased by the Quartermaster General are made after public advertisement and the submission and acceptance of bids and precede the furnishing of the articles contracted for. Such was the practice before the great war, and it was continued into the early stages of that conflict, but it was not long until the rapid increase in the number of men being drawn into Army service, with resultant and constantly increasing demand for food supplies, rendered further adherence to peace-time methods out of the question if service men were to be adequately rationed.

If we may view the transactions with which we have to deal in the light of the times—and it seems not only a right but a duty to do so—we may well consider the situation which confronted the officers charged with the duty of feeding a vast and rapidly increasing army. The increase was not only rapid but its rapidity could not be accurately estimated no more than could its end be foreseen. The situation was without precedent, experience as a guide was absent, the responsibility was terrific. It is in the light of this condition that we are to consider some of the features of this case and determine the application of some of the documents appearing in the record.

Underlying this suit in all its features is the question of authority, a vital question in its relation to each of plaintiff's theories and one which finds a prominent place in the defense.

There were all sorts of organizations and reorganizations, and delegations of powers and limitations of powers, etc., much of it emanating from the office of the Director of Purchase, Storage and Traffic, General Staff, and some of the procedure might tend to the conclusion that all authority, even that of the Quartermaster General, was vested in this bureau, but whatever the scope of this authority generally might have been, the conclusion is justified that, whether because he had it under the statute or because it was intended to give it to him, authority in matters such as those here involved was primarily in the Quartermaster General, and this we understand to be the view of both parties, eliminating any occasion for discussion. At a later period, under a reorganization plan, the Acting Quartermaster General was designated as and assumed the duties of Director of Purchase and Storage, so that from the

standpoint of personality the authority remained as before, although under a different official designation.

The defendant's expressed view as to the authority of the Quartermaster General is modified somewhat by the attached condition that his powers were to be exercised under the supervision of the Chief of Staff until the organization in the department of the Division of Purchase, Storage and Traffic in February, 1918, and the subject is treated as if the word "supervision" as used meant control. We have no desire and do not find it necessary to go into any possible question as the authority of the Chief of Staff, but it is proper to remember that the devision referred to as organized in the department was an adjunct of the General Staff, that its head was a very distinguished officer detailed as an Assistant Chief of Staff and assigned to that duty, that the General Staff was a creature of statute, that at least for a time its powers were expressly limited by virtue of the provisions of the national defense act of June 3, 1916 (39 Stat. 166), and that one of the declared purposes of Congress in the writing of those limitations was to prohibit the absorption of authority delegated by statute to other bureaus.

There were established within the Quartermaster Corps, pursuant to regulations, general supply depots for the purchase and storage of quartermaster supplies which were under the control of the Quartermaster General but directly under command of an officer design-

nated as the depot quartermaster who was a purchasing officer,
77 and a very important one of these depots was located before, during, and since the war at Chicago. On April 24, 1917, Colonel, afterward Brigadier General, Kniskern was relieved from duty as quartermaster, Central Department, and directed to take charge of the general depot of the Quartermaster Corps at Chicago, and on August 20, 1917, Major Skiles was directed to proceed to Chicago and report to the depot quartermaster for assignment to duty as his assistant.

General, then Colonel, Kniskern was relieved from duty as quartermaster, Central Department, that he might be sent to this duty, and it is noticeable that he was given this assignment within less than three weeks after the declaration of war and retained it until his retirement on September 1, 1919. There was no doubt then full comprehension of the importance and magnitude of the duties which would devolve on the depot quartermaster at Chicago in connection with the procurement of food supplies for the Army, and it must be assumed that consideration of his fitness and competency had to do with his selection for this important post. That the confidence reposed in him was not misplaced seems to us to be abundantly demonstrated by the record in this case.

It seems scarcely necessary to go into a detailed discussion of the source of his authority, which primarily emanated naturally from the position he held, subject of course to the direction of his superior, or of the restrictions and limitations which it is contended were thrown about his exercise of that authority and, if applicable, really

cast upon his whole course of official conduct the stigma of illegality. And yet for months our rapidly increasing Army was adequately supplied, both at home and abroad, with immense quantities of bacon and other meat supplies purchased by General Kniskern, delivered and paid for, and we have no intimation of a contention by any one that he was acting without full authority. An officer might make an isolated purchase without authority and without the knowledge of his superior, but these purchases furnish their own repudiation of such a contention.

Many orders, circulars, etc., which are in the record are referred to in detail in defendant's brief and are the basis of the contention, as we understand it, that their provisions were applicable to the purchase of Army bacon during the war and that where, by those orders, boards or divisions or committees were created in the Quartermaster General's Office with assigned powers as to authorization, approval, etc., of purchases, they furnish a method of procedure which must be complied with in all cases, Army bacon included. There were a great many divisions in the Quartermaster General's Office handling different classes of supplies and as to these there was no doubt a purpose to centralize, coordinate, authorize, supervise, and approve. But because such boards or divisions were created and no doubt served a good purpose, it does not follow that the Quartermaster General, the superior authority over all of them, might not authorize, direct, and approve other and necessary procedure in the matter of bacon purchases. We find it declared officially that the "paramount consideration is uninterrupted supply." The character of the supply, the time necessary in its preparation, the uninterrupted and constantly increasing demand, and the vital necessity are conditions which not only compelled the abandonment of peace-time methods

but precluded the following of a path necessarily strewn with instruments of delay. As to these prescribed methods of procedure we have found that while they did not in terms except Army bacon from their provisions, they were never treated as applicable thereto. It would be passing strange if the Quartermaster General should find himself hampered in the discharge of such important duties by subordinate machinery in his own office.

But the record more clearly, affirmatively, and indisputably discloses the authority reposed in General Kniskern in connection with the creation in Chicago on July 3, 1918, of a "packing house products branch of the subsistence division of the Quartermaster General's office." There was such a division in the Quartermaster General's office which functioned for him in some respects in connection with subsistence supplies and it is quite apparent that it was to facilitate such matters and avoid any possible delay, that this branch was established in Chicago. It was located in the general supply depot of which the depot quartermaster was in command and it was directed that it was "to be under the immediate direction and control of the depot quartermaster, and to be responsible for all matters pertaining to the procurement, production and in-

spection of packing house products, subject to the control of the Quartermaster General." If there were still room for any doubt as to the situation it is removed by General Wood, who was then Acting Quartermaster General and who, when called as a witness in this case, interpreted this order in a manner so consistent with the necessities of the situation as to be practically self evident and, by implication at least, in entire confirmation of our estimate as to the capacity of General Kniskern. General Wood, speaking of this order, said that whereas the purchasing of supplies was concentrated in Washington, that "Chicago being the food market, we delegated to General Kniskern the purchase of meat products and articles of that kind."

Later on, under a reorganization plan, General Wood, the still acting Quartermaster General, was designated as "Director of Purchase and Storage" (purchase and storage were purposes for which general supply depots were established) and by order he created supply zones by territorial divisions and provided in the order that he appointed "as his representatives in each general procurement zone the present depot quartermaster to act and be known as the zone supply officer," he being "charged with authority over and responsibility for supply activities within the zone under his jurisdiction."

In connection with the consideration of this case it may be said that we are only concerned with authority as it existed at the particular times involved herein but not only is the scope of the case in one respect at least quite broad but other considerations seem to justify a rather comprehensive view of the whole situation.

And in this connection, a matter which we hesitate to mention because we do not care to be regarded as indulging in criticism, we think it is pertinent to call attention to the fact that when this plaintiff's claim was before the contract adjustment board and afterwards before the Secretary of War, no question of authority was at any time raised, and that apparently during the taking of testimony in chief by both parties there was no such question injected into the case. It seemingly made its appearance for the first time during the taking of testimony in surrebuttal by the defendant.

79 There is perhaps one other feature of this matter which should be mentioned due to the injection of the theory, predicated on evidence in surrebuttal, that another officer was clothed with authority as a purchasing and contracting officer, with jurisdiction over bacon purchases, and actually, under that authority, beginning in September of 1918, bought all the bacon. We hesitate to comment on some features of this situation as developed in the testimony, and will only call attention briefly to official orders set out in Finding VIII and necessarily related suggestions.

The contention is predicated primarily on the order first referred to in that finding by which on September 27, 1918, Captain Jay C. Shugert, Quartermaster Corps, was appointed purchasing and contracting officer for "the packing house products and produce division of the office of the depot quartermaster at Chicago."

From what has already been said with reference to the creation on July 3, 1918, of "the packing house products branch of the subsistence division of the Quartermaster General's office" and the conclusive interpretation put on that order by General Wood there is no room for question that the authority in the matter of bacon purchases reposed here. Captain Shugert was not then at Chicago and it is to be noted that his later appointment referred to was not in "the packing house products branch of the subsistence division of the Quartermaster General's Office," still then in existence, but in a different service characterized as a "division of the office of the depot quartermaster." The terms are quite similar, indeed so much so as to indicate a possibility of no real distinction in scope of authority, but in important respects they were quite different, and if it should be contended that there was no real difference and that Captain Shugert's appointment vested him with authority in "the packing house products branch of the subsistence division of the Quartermaster General's office" it is only necessary to note from other orders set out in the finding that in January, 1919, there was a transfer, indicating thereby a clear distinction, and an elimination as a division of the depot, and on another day a "change order" of the depot relieving Captain Shugert from further duty in the packing house products "division" (of the depot) and assigning him with others as "assistants to the officer in charge packing house products branch, subsistence division, Office of Director of Purchase." This branch of the subsistence division Quartermaster's office had been transferred in connection with a reorganization referred to above to the office of the Director of Purchase and Storage, the same officers in charge under different official designations. The facts as to the transfer are set out in Finding VI.

When the developments already cited indicated the clear necessity of resort to more expeditious methods of procuring bacon, General Kniskern called into conference representatives of the seven large packers, plaintiff included, upon whom of necessity chief reliance must be placed for adequate supplies, and repeated conferences eventuated in the plan which thereafter was followed. In substance it was that General Kniskern or Major Skiles, his assistant, or frequently both of them, would at intervals hold a conference with the packers and notify them of the amount of bacon, canned meats, etc.,

which would be required during a stated period, usually three 80 months, and approximately two months in advance because of the time required for preparation. Each packer was requested to propose as soon as possible the quantity of each desired product it could undertake to furnish, and this they did in writing usually within two or three days after the conference. Afterward they were informed in writing as to what they should furnish either by an acceptance or modification of their proposals. They were requested to proceed at once with preparation of the product and, certain elements of cost being then uncertain, it was agreed that prices would be determined about the first of each month and purchase orders thereafter issued as a basis of payment.

The depot quartermaster was supplied with War Department forms of proposal which were used by bidders when following usual peace-time methods in submitting their competitive bids, and when the time came near the beginning of each month for the packers to submit their prices for that month on the product already awarded and then necessarily in course of preparation, these forms were sent out to the packers as a matter of convenience, but they were intended to be used merely for the submission of prices on the product already awarded, and in no sense for the submission of competitive bids. If the prices submitted were satisfactory, they were accepted as submitted, otherwise adjusted to a satisfactory basis. It was understood that the prices would be based on cost of production with a profit added within the limits fixed by the Food Administration, which was 2½ per cent on gross cost, and this basis prevailed without change so long as this method was in vogue. Sometimes, by reason of varying costs, prices were fixed twice a month. At a convenient time after the prices had been fixed the purchase orders were issued, not as authority to produce, for frequently the product had already been not only produced, but delivered, but as a necessary basis of payment.

There was modification of this plan in that in July, 1918, the food purchase board, organization of which is recited in the findings, concluded that because of the shortage which had developed in the supply of bacon and canned meats these products should be placed on an allotment basis under the Food Administration, and thereafter there were allotments, of which we shall speak hereafter, and for the months of September, October, November, and December the prices were fixed by the Food Administration, but on the same basis of cost and profit as theretofore.

The Food Administration began preparing to go out of business and in the respects herein involved ceased to function in December, 1918. Thereafter for the months of January and February, 1919, prices were fixed as they had been previous to September and for the products of those two months purchase orders were issued as theretofore, but in addition formal contracts were afterward prepared covering those two months, three covering the month of January and one the month of February. The purchase orders for January and February were both issued in February, that for February in fact preceding that for January, due to the fact that the purchase order for January issued February 10 was in lieu of one

issued January 4 and for some reason canceled. The formal
81 contracts for January were dated February 10, approved by
the Board of Review, February 26th, and executed by Swift &
Company, March 8, 1919. The contract for February deliveries was
executed by the representatives of the United States "as of the
fourth of February, 1919," the date of the purchase order, the actual
date of execution not being shown, approved March 1, 1919, and
executed by Swift & Company, March 12, 1919.

It should perhaps be noted that all bacon purchased of the plaintiff under the plan above indicated, from its inception to and including the month of February, 1919, was accepted and paid for and so far as appears of record, no question was ever raised either as to procedure or price.

We deem it advisable now, and before considering other theories, to address ourselves to plaintiff's case upon the theory of a contract within the general jurisdiction of this court under section 145 of the Judicial Code.

What has been said presents a general view of the whole situation and renders us familiar with the circumstances surrounding and the reasons for the procedure involving bacon production for delivery in March, 1919, the subject of the controversy here. These circumstances throw light on the whole situation and illuminate the intention of the parties. As we may consider surrounding circumstances to aid in the interpretation of an ambiguous contract so may we view the transaction here involved through the atmosphere of the times to the end that our vision may correctly interpret the actions and intentions of the parties.

The particular procedure involved here as determinative of the question as to whether there was a valid contract for bacon for March, 1919, delivery, is set out in full in Finding XVI, and we shall endeavor to avoid much of detailed repetition. The underlying features are, in the light of the facts stated as to one of these conferences held on the 9th of November, 1918, at which the representatives of the seven large packers were informed of the need of 60,000,000 pounds of bacon for January, February, and March, 1919, the proposal of Swift & Company, the request of General Kniskern to the Food Administration for allotments, the allotments to Swift & Company, Swift & Company's acceptance, and General Kniskern's notice to Swift & Company as to deliveries to be made by them.

In this connection it is to be noted that the plaintiff theoretically derives contracts from these communications in two different forms: First, as growing out of Swift & Company's offer, the Food Administration's allotment, and Swift & Company's acceptance; second, Swift & Company's offer and General Kniskern's acceptance, and relative to the action of the Food Administration it seems to be the theory that that action may be treated in two ways, each eventuating into a contract, that is, either as an acceptance of Swift & Company's offer or as an offer on the part of the United States, accepted in turn by Swift & Company.

These different theories in so far as they incorporate the action of the Food Administration as a contractual element render necessary a consideration of the status and authority of that organization.

In August, 1917, after the passage of the food control act, approved on the 10th of that month (40 Stat. 276) the President, by Executive order, created the United States Food Administration and delegated to it all the powers and authority given him by that act.

The title of the act indicates that its purpose was to provide further for the national security and defense "by encouraging the production, conserving the supply and controlling the distribution of food products and fuel," and in the first section it was declared to be essential, among other things, to assure an "equitable distribution" of food. These quoted words are lifted out of the context because they seem to indicate the purpose of the act which was manifest in the allotments with which we deal in this case.

The Food Administration was an instrumentality of the Executive, and when we deal with war times we do not with good grace question the authority of the Executive or his instrumentalities, but for the purposes of this case there seems no occasion to deal with the Food Administration for the purpose of determining the effect of its action otherwise than as its authority and purpose is revealed by the act itself.

We can find in the Food Administration, at least in its relation to transactions such as those here involved, no authority to contract nor can we find in the record, in connection with its allotments of bacon, any evidence of intention or attempt to contract.

Through a board, the extent of whose authority we need not discuss but the purpose of which was manifest, bacon and canned meats were on July 16, 1918, placed on an allotment basis "on account of the shortage which had developed." The purpose seems apparent from the statement itself and it naturally invoked the power of the Food Administration to assure an equitable distribution. There was nothing in the situation to suggest any reason why the Food Administration should assume to make contracts. There was reason suggested why it should look after distribution of available supplies "to prevent," as said in the act, "locally or generally, scarcity, monopolization, hoarding," etc. Since Army bacon was scarcely a commercial product there would seem to be little occasion for the action taken, but this was a feature of the matter probably given no consideration. The activity of some war-time instrumentalities was commendable even if the results were not apparent.

When, therefore, General Kniskern, having received the proposal of Swift & Company on November 12, following the conference of November 9, and having determined that Swift & Company should be assigned the production of 6,000,000 pounds of serial No. 10 bacon for January delivery, 5,500,000 pounds for February delivery, and 6,000,000 pounds for March delivery, he requested of the Food Administration allotments, among which these amounts to Swift & Company were included, and the Food Administration on December 3, 1918, notified Swift & Company that, on requisition of the packing house products branch, subsistence division, Quartermaster General's office, they had been allot'd the identical amounts stated for each of the three stated months, it was nothing but an authority to Swift & Company from the Food Administration, in the

exercise of its power to control distribution, to furnish that much bacon in those months to General Kniskern, representing the packing house products branch, subsistence division, Quarter-
83 master General's office, and to that authority Swift & Company were referred for any further information.

If, therefore, these documents set up in Finding XVI are to be construed as constituting a contract for the bacon in question, the allotment by the Food Administration is to be regarded as but the authority from the allotting power to Swift & Company and General Kniskern to enter into a contract for that much bacon.

In considering the question of a contract under circumstances involving a departure from established methods it may be observed first that the transaction is in any event relieved from infirmity because there was no advertising for bids. Section 3709, R. S., no matter how it may be construed in other respects as affecting a case such as this, is certainly to be construed, in connection with the order of the Secretary of War set out in Finding III, as relieving from the necessity of advertising. It is true that whatever the exigencies there could not be immediate delivery because of the time necessary for preparation and in that sense the transaction could not be within the strict letter of the statute, but it was within the true spirit thereof, in addition to which it is apparent that to require advertising would have been but to require a vain thing, a situation such as results when there is but one possible bidder, since the purpose was not to procure competition bids for a quantity well within the available supply but to procure all of that supply.

The effect is therefore for determination, following such a conference as had been held many times before and for the same purpose, of the submission of a proposal in writing by the plaintiff and its acceptance thereafter in writing by the authorized representative of the United States, the proper authorization or allotment by the Food Administration having intervened, the resulting contract, if one did result, being for the period of three months with stated quantities for delivery in each one of those months and having been fully performed as to the first two of those months and at least partially performed as to the third.

Preliminary to the main question for consideration we may note the suggestion that the proposal was to furnish 17,500,000 pounds of serial No. 10 bacon and 4,000,000 pounds of serial No. 8, apportioned to the three months, and that the acceptance of General Kniskern was not in the terms of the proposal in that the acceptance authorized the furnishing only of the serial No. 10, the canned bacon.

The needs stated for these three months at the conference of November 9 were for 60,000,000 pounds divided equally between serial No. 8 and serial No. 10, but there was no requirement that each packer should assume to furnish the same quantity of each, and when the plaintiff proposed to furnish a larger quantity of serial No. 10 than of serial No. 8, attention was called to the installation

of a canning plant at great expense, and it was said that the amount of serial No. 10 which it was proposed to furnish was the minimum amount required to operate its canning plant at fair capacity. It was thus apparent that the plaintiff was seeking an award of serial No. 10 in the quantity proposed, and in preference to serial No. 8, award was made to it for that exact quantity of serial No. 10, with reference to its proposal on serial No. 10, and the fact that the acceptance did not also include the serial No. 8, covered by the
84 proposal, can not be regarded as any such variance as would create an infirmity in the transaction in the absence of specific acceptance of the modification. The circumstances did not justify the implication that it was such a proposal as must be accepted in toto or not at all, but, on the contrary, the terms of the proposal implied a right to modify as to quantities of either or both kinds within the limits of the total proposal.

As against a conclusion that plaintiff's proposal or offer in writing and General Kniskern's response, equivalent to an acceptance, gave rise to a valid contract, the provisions of section 3744, R. S., are vigorously urged. By that section it is made "the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof," followed by provisions with reference to the filing of a copy in the returns office of the Department of the Interior.

The section finds its origin in the act of June 2, 1862 (12 Stat. 411), which was entitled "An act to prevent and punish frauds on the part of officers intrusted with making of contracts for the Government," it imposed a duty on the officers named and succeeding sections taken from the same act impose a penalty on these officers for a violation of its requirements. The statute does not in terms address itself to the validity of the contract and it is not provided that non-compliance therewith shall render a contract otherwise made void. But in the Clark case, 95 U. S. 539, appealed from this court, it was held that the contract is itself affected and must conform to the requirements of the statute, and, further, it was held that the statute in question was intended to operate as a statute of frauds. And the conclusion of the court must have been predicated upon a consideration of the statute as a statute of frauds, for while the plaintiff was not permitted to recover for the value of his boat, his rights in that respect being treated as those of a bailor, he was permitted to recover the value of the use of the vessel for the time she was in the hands of the Government. This contract, it is to be noted, was in parol and it is said, "We do not mean to say that where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services."

This case was a pioneer in the construction of this statute and resulted in some differences of opinion, evidenced by the dissent of three members of the court, and because of its rather striking applicability to the instant case, we deem it not inappropriate to quote a paragraph from the dissenting opinion of Mr. Justice Miller, as follows:

"If there is any branch of the public service where contracts must often be made speedily, and without time to reduce the contract to writing, it is in that of the army. Sudden occasions for supplies, for the occupation of buildings, for the transportation of food and munitions of war, are constantly arising, and in many of them it is impossible to do more than demand what is wanted and agree to pay what it is worth. Did Congress intend to say that the patriotic citizen, who said 'take of mine what is necessary,' is to lose his property for want of a written contract, or be remitted to the delays of an act of Congress?"

But the question here involved does not turn upon the validity of a contract in parol. It hinges upon an exchange of instruments in writing, each signed by one of the contracting parties.

And in this connection there should no doubt be reference to the act of March 4, 1915 (38 Stat. 1078), applying to quartermaster's contracts, with which class this case deals, wherein it is provided that contracts made by the Quartermaster General, or by officers of the Quartermaster Corps authorized to make them, which are not to be performed within sixty days and are in excess of \$500.00 "shall be reduced to writing and signed by the parties," omitting the words "with their names at the end thereof," and providing that in all other cases they shall be entered into under such regulations as may be prescribed by the Quartermaster General. The purpose of this act was probably to dispose of controversies which had arisen as to the effect of several antecedent acts, exempting certain classes of purchases in certain circumstances from the operation of section 3744, and to the extent that its terms are at variance with the provisions of that section it must be regarded as an amendment thereof. If it affects this case it is only because it lends countenance to a conclusion that section 3744 may be complied with without the appending of the signatures of both parties on the same paper "at the end thereof." But that has been determined irrespective of this act.

In the recent case of American Smelting and Refining Company v. The United States, 259 U. S. 75, affirmed on appeal from this court, in which the contract was by the Ordnance Department, it was held that two letters, one submitting a proposal and the other accepting it, constituted the contract, notwithstanding the fact that the execution of a formal contract was contemplated and unaffected by the fact that there were repeated requests that the plaintiff should sign a formal contract which it ultimately did under protest, "because" it is said, "these facts in no way modify the relation of the parties under the contract by letters already made." Further it is said that remedy is excluded under the act of March 2, 1919 (40 Stat.

1272), commonly called the Dent Act, a statement predicated, it must be inferred, on the conclusion that there was no such informality in the contract as brought it within the purview of that act. There are other statements in the opinion in this case possibly valuable for reference hereafter.

In *United States v. New York & Porto Rico Steamship Company*, 239 U. S. 88, a Navy case, it is said that "of course the statute does not mean that its maker, the Government, one of the ostensible parties, is guilty of unlawful conduct, or that the other party is committing a wrong in making preliminary arrangements, if later the Secretary of the Navy does not do what the act makes it his duty to do," and the opinion concludes with the statement that "even when a statute in so many words declares a transaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, void being held to mean only voidable at the party's choice." And if the learned justice had had occasion to go further and consider the circumstances under which

there might be an election to declare a voidable contract void,
86 he would no doubt have held, in line with well-established principles, that no such right remained after performance.

In *United States v. Andrews*, 207 U. S. 229, the contract was made by correspondence, and in considering the contention that the contract did not conform to the requirements of section 3744 it is said, "but it is settled that the invalidity of a contract because of the noncompliance with the section referred to is immaterial after the contract has been performed," and *St. Louis Hay, etc., Co. v. United States*, 191 U. S. 159, is cited.

The case cited is no doubt referred to as an authority on the proposition stated therein that "the invalidity of a contract is immaterial after it has been performed." There are other features of the case of some interest, but the pertinent propositions are the holding by this court that the advertising, proposal, and acceptance did not constitute a valid contract because not in compliance with section 3744, which holding the Supreme Court approved, but, after stating the proposition above quoted, with some elaboration, cites the fact that actions on the part of the United States of which complaint was made were but the exercise of rights "which were reserved in the fullest and most express terms" and that there was no breach, concluding that there was no valid claim "because the United States has done all that it undertook to do." The gist of the case is that the procedure had created no valid contract because not in compliance with section 3744, but that the invalidity was immaterial after performance and the rights of the parties are considered under the terms of the contract which was invalid but for performance.

The *South Boston Iron Company* case, 118 U. S. 37, cited by the defendant, affirmed this court on appeal. The plaintiff made two separate proposals to the Navy Department to furnish boilers for naval vessels and both were accepted in writing by direction of the Secretary. A few days thereafter plaintiff was notified by the Sec-

retary of the Navy to "discontinue all work by you contracted for with this department" since March 1, 1877, until otherwise directed, etc., and, failing to procure a settlement of a claim presented, suit followed in this court.

The opinion of the Supreme Court is very short, refers to the Clarke case, holds that the papers relied on were nothing more than preliminary memoranda made by the parties for use in preparing a contract, which was never done, and says that within a few days the whole matter was abandoned by the department and that the Iron Company had neither performed any of the work or been called on to do so.

The proposals, which were apparently on the plaintiff's own initiative based on information received from some undisclosed source and without any invitation to submit, were to furnish boilers, as may be required, according to drawings and specifications which in fact were not then in existence, and the acceptances both stated that "The specifications and drawings will be furnished as soon as possible."

The uncertainty as to what the plaintiff was to do was strongly urged by the defense in this court, and Judge Richardson in his opinion cites the uncertainty by stating that "If it should be held that these papers constitute valid contracts against the Government,

it is not at all clear that they have been broken by the defendants. The claimant's proposals state that he has learned that new boilers are required for certain ships, and then says, 'I will build such new boilers as may be required for the above-named ships,' etc. This language implies conditions as to the requirements of the service apparently to be settled in the future," with further comment along the same line.

It is true that the case was not turned on this condition, for it was held that so much of section 3744 as provides that contracts shall be "reduced to writing and signed by the contracting parties with their names at the end thereof" is mandatory and "contracts which do not comply with its requirements are void," but the line of argument is addressed largely to the proposition that "a whole and complete contract was not signed by either party," and stress is apparently put upon the conclusion to be drawn from the use of the words "at the end thereof" and to the extent that significance was given to those words it could not prevail under the act of March 4, 1915.

Necessarily it is what the Supreme Court said which is governing, but it is noticeable that the case in this court developed so much of uncertainty that there was apparently no room to hold that these papers could by any possibility make a contract and so this court said "they are only preliminary memoranda to be used in drawing a contract" and the Supreme Court said "We agree with the Court of Claims that the papers relied upon for that purpose are nothing more in law or in fact than the preliminary memoranda made by the parties for use in preparing a contract for execution in the form

required by law" and, upon a review of the case, it would seem not only that the statement was entirely true, but that under the circumstances there was room for no other, although not to be taken as enunciating a principle applicable where the facts may not fit. As possibly of significance in another view, it is to be remembered that having announced the conclusion quoted above as to the purpose and effect of these papers it was regarded as proper to add that the plaintiff had neither performed any of the work or been called on to do so.

In *Harvey v. United States*, 105 U. S. 671, too long to review in more than one feature, the commanding officer of the arsenal at Rock Island, Ills., had advertised for bids for the construction of piers and abutments for a bridge, plaintiff had submitted a bid in writing which the officer had accepted in writing, after which a formal contract was signed by both parties. Controversy arose in one respect, as to whether the plaintiff was required to construct the necessary coffer dams, and the question was decided in the affirmative by this court on a construction of the formal contract. After a subsequent procedure under a special jurisdictional act, in which this court refused to reform the contract, the case was appealed, and after a lengthy review the Supreme Court, upon the point of interest here, said, "The written bid in connection with the advertisement, and the acceptance of that bid, constituted the contract between the parties, so far as regards the question whether the contract price embraced the coffer-dam work," citing *Garfield v. United States*, 93 U. S. 242; *Equitable Insurance Company v. Hearne*, 20 Wall. 494; and "The written contract, in that respect, was intended by both

88 work and prices contained in the bid," a statement not inconsistent with the idea that this "reduction to form" might furnish compliance with section 3744, although that view of the matter is not suggested; but after discussion bearing upon the question of reformation, it is further said in significant language, in which we take the liberty of italicizing a word, that "We are of the opinion that, by the actual contract between the parties, the appellants were not to do any of the work covered by the claim made by them under item 1 of the petition herein (the coffer dams), and that the written contract must be reformed accordingly." The contract referred to as the "actual" contract was, of course, that which it said the advertisement, the bid, and the acceptance constituted.

In *Brown v. District of Columbia*, 127 U. S. 579, the validity of a paving contract was involved. The authority was in the board of public works, there was a statute in force requiring that "all contracts made by the said board of public works shall be in writing and shall be signed by the parties making the same and a copy thereof shall be filed in the office of the Secretary of the District," and the contract was by proposal and acceptance in writing by the secretary of the board. The contract was held invalid because it was

concluded that the proposal had never, in fact, been before the board for action, but it is said:

"The appellant contends that the alleged contract sued upon meets the requirements of paragraph 37 of the act of February 21, 1871, which provides that 'all contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District'; and that the contract sued upon being a formal proposition in writing, and an acceptance thereof in writing signed by the secretary of the board, whose authority to sign the same is not denied, and whose genuine signature thereto is admitted, was a valid contract binding upon the parties.

"Numerous authorities are cited to show that the written acceptance by one party of a written proposal made to him by another party creates a contract of the same force and effect as if formal articles of agreement had been written out and signed by said parties. The legal principle asserted is sound, but the fallacy of the argument lies in the assumption that the proposition of the pavement company was in fact submitted to the board, and that the latter did in fact authorize the letter to be written by Secretary Johnson accepting the said proposition."

There are cases in this court to which we are referred, not involved on appeal in the decisions of the Supreme Court above reviewed, but with perhaps two or three exceptions they add nothing to what has been said. Apparent inconsistency results from the following of decisions of the Supreme Court subsequent to rulings made.

The Wentworth case, 5 C. Cls. 302, justifies an open market purchase under the act of March 2, 1861, afterward section 3709, R. S. In Cobb, Christy & Co., 7 C. Cls. 470, the purchase was held authorized by the act of July 4, 1864, an emergency war measure to operate only within a limited time, as also in the Updegraff case, 8 C. Cls. 514, and in the Thompson case, 9 C. Cls. 187, but the last three mentioned cases are in effect overruled by Cobb, Blasdell & Co., 18 C.

89 Cls. 514, which is apparently founded on the Clark case and, besides other infirmities, invokes and applies the act of June 2, 1862 (sec. 3744 R. S.). In the Pacific Steam Whaling Company case, 36 C. Cls. 105, an emergency purchase, the emergency being indicated by a special relief act, was held not to be within sec. 3744, and this case is cited in the case of Moran Brothers Company, 39 C. Cls. 486, in which case it is held that a transaction involving an emergency came within sec. 3709, "which obviates the necessity of reducing the contract to writing." In Johnston's case, 41 C. Cls. 76, it was held that "while it may be admitted that a written contract may be made out under that section (3744) by letters of correspondence between the parties" the absence, in that case, of the proposal was a fatal defect, which could not be supplied by the reply thereto and acceptance of conditions therein. In the case of the Export Oil Corporation, 57 C. Cls. 519, in which a demurrer was sustained to the petition, the contract was oral and no per-

formance was pleaded. Section 3744 was held mandatory and 3709 not applicable.

The Monroe case, 184 U. S. 524, is strongly urged by the defendant upon another theory than that involved in the foregoing considerations. An Engineer Corps contract, reduced to writing was involved, in which it was specifically provided that "This contract shall be subject to the approval of the Chief of Engineers of the United States Army" and the contract was held invalid because not so approved. It would be difficult, if one were disposed, to find ground for exception to the conclusion in that case. The condition was a matter of express agreement between the parties and it in effect retained in the Chief of Engineers the authority to contract. The analogy is found by the defendant in an order of the Quartermaster General's office creating a Board of Contract Review, and it is contended that no contract was enforceable unless first approved by this board "because something further remained to be done in order to make it a finality." We have already adverted limitedly to the question of the applicability of many existing orders and regulations to contracts such as those here involved, and there is a finding on the subject. The order or "Notice" as it is called, here involved, was issued from the office of the Quartermaster General, covered so many subjects that more than 20 printed pages are required for its reproduction, and superseded former similar notices. It recites that its purpose is to insure proper control over purchases. In the light of what has already been made to appear as to the attitude of the Acting Quartermaster General with respect to bacon and similar purchases, it is scarcely reasonable to assume that he intended that authority vested where and exercised as he intended it to be exercised, could not find sufficient warrant in his authorization without first procuring action at the hands of his subordinates whose powers, proper for exercise in many respects, were never intended to function in the respects here involved.

There are, of course, many cases that might be cited in which section 3744, or some similar statute is not involved, sustaining the rule that a proposal and acceptance may constitute a valid contract. Indeed, such a rule is so self-evidently correct that question is scarcely conceivable for it partakes much more of formality than does the rule of validity of parol contracts when not within the statute of frauds.

90 In the light of some of the authorities cited the conclusion is justified that in the matter of governmental contracts a proposal in writing signed by the proposer and an acceptance in writing signed by an authorized officer is a sufficient compliance with section 3744, and particularly with that section as modified or amended in respect to Quartermaster contracts by the act of March 4, 1915. A modification of the stringent rule of section 3744 is apparent from the language of that section compared with that of the act mentioned, but it is also apparent from the discussion of the section in some of the cases that stress was put upon the concluding words,

166

"with their names at the end thereof," which were omitted from the act. It is suggested in the opinion of this court in the South Boston Iron Company case, 18 C. Cls. 165, wherein the Supreme Court approved the view of this court as to the characterization of the writings involved as "preliminary memoranda," that "negotiations, correspondence, proposals, and acceptances, although conducted in writing, but signed only in part by one party and in part by the other, do not constitute the required complete contract signed in whole by both parties," and "a whole and complete contract was not signed by either party. The claimant signed the proposals and the defendants the acceptances," language, the use of which may well be doubted if the act referred to and not section 3744 above were for consideration.

But if there be doubt whether, without more, a proposal and acceptance in writing may be held to be a sufficient compliance with the statutes referred to, it is held, and upon this question there seems to be no division of opinion, that "the invalidity of a contract because of the noncompliance with the section referred to is immaterial if the contract has been performed."

X The application of this principle to the instant case renders necessary a consideration of the question of performance, not only because of its essential character as the foundation of the rule, but because of some contentions by the defendant. The briefs are so lengthy and the arguments so much in detail upon every conceivable phase of the case that it is impossible in an opinion, already undesirably long, to refer to them specifically, but some involved matters must be referred to, the application to be made where proper.

Involved in the question of performance as well as in other contentions of the defendant, is the scope, or perhaps we should say subject matter, of the contract. The fundamental error is that, as a basis for argument, the contract, assuming that there was one, related only to bacon supplies for the month of March, 1919. It is entirely true that this suit relates only to bacon for March delivery since that for January and February was manufactured, delivered and paid for and therefore as to it there is no controversy, but the fact that March bacon is alone the subject of the suit does not justify the treatment of the contract as a contract for March alone.

X From the inception of the transaction here involved bacon for January, February, and March deliveries was the matter to which the parties addressed themselves. At the conference of November 9, the total needs for the three months were made known. The plaintiff's proposal, the Food Administration's allotment, in so far as that is material, and General Kniskern's award all covered the three months. Any separation of the month of March and its treatment as a matter of independent negotiation is, therefore, unauthorized.

91 It follows then that there was full performance of the January and February portions of the contract, and a partial performance

as to the month of March, on the basis of the original provision as to that month, or a full performance if the contract as to that month be deemed modified.

Some of the authorities cited justify the conclusion that a partial performance is sufficient for the purpose of the rule under consideration and if, so stated, it is of doubtful application, the doubt is removed when it is added that if one party partially perform and is ready and willing to complete performance but is prevented or induced therefrom by the other, the latter may not take advantage of failure to fully perform. Under the facts of this case it seems to us that for the purpose under discussion the plaintiff is entitled to the benefits of full performance, but there is another view of the matter leading to the same result.

By the letter of January 24, 1919, General Kniskern informed Swift & Company that due to the rapid demobilization of the Army and constantly decreasing demand, the Government would not be in the market for certain named products for March delivery, except that such bacon as was already in cure above what was necessary to complete February deliveries, and had been passed by the inspectors, would be accepted. This was in the nature of a modification or partial cancellation and was readily acquiesced in by the plaintiff. Plaintiff having already in cure sufficient bellies to complete February deliveries had commenced on January 13, to put bellies in cure for March deliveries and from that day until the receipt of this letter had each day been putting bellies in cure under Government inspection. On receipt of this letter they conformed thereto by ceasing to put any more bellies in cure and notified Squire & Co., to do likewise, with which instruction they complied. The proposal of General Kniskern to accept such quantity of "bacon" as was already in process of cure necessarily implied that the bellies in cure should be smoked, without which it was not "bacon," and canned, without which it was not "serial 10."

Under erroneous date of February 5, 1919, instead of March 5, there was further modification by notification that bacon in smoke in excess of that required for February deliveries would be accepted but that no more should be put in smoke and although there was then in cure at the Swift plant 417,881 pounds of bellies and at the Squire plant 650,658 pounds which had not yet been put in smoke, and which the letter of January 24 had stated would be accepted, the plaintiff acquiesced also in this modification and notified Squire & Company to act accordingly.

It seems quite clear then, for the purposes of the stated rule as to the effect of performance, the plaintiff is entitled to the benefit of full performance. It was to its credit that it made no objection to complying with the instructions of General Kniskern and it would be inconceivable to invoke a rule which should penalize it for so doing. It should not be put in a worse position by the refusal of the defendant to accept full performance and be made to suffer by reason of its

willingness to accede to modifications of the contract prompted by
the best interests of the Government. It did all that it was
92 asked to do, and so far as obligations were laid upon it the
contract was fully performed.

It is urged as against a conclusion that these exchanges constituted
a contract that, so considered, they were incomplete in that a vital
element was lacking by reason of the omission of any fixed price,
but such a contention is without force. If the price had been left
wholly out of consideration and there had been no understanding
between the parties with reference thereto and no understood basis
upon which it was to be arrived at, the contention would at least
have rested on a plausible foundation, but such is not the case.
There were manifest reasons, in the interest possibly of one, possibly
of the other party, why the fixing of the price should be deferred,
it was so agreed, it was, in the instance here involved, in accordance
with usage in this respect, and the basis upon which the price would
be fixed was thoroughly understood.

"Undoubtedly the existence of a separate oral agreement as to any
matter upon which a written contract is silent, and which is not
inconsistent with its terms, may be proven by parol, if under the
circumstances of the particular case it may properly be inferred
that the parties did not intend the written paper to be a complete
and final statement of the whole of the transaction between them."
Seitz v. Brewers Refrigerating Company, 141 U. S. 510.

In Williston on Contracts it is said, "It has long been settled, that
in commercial transactions, extrinsic evidence of custom and usage
is admissible to annex incidents to written contracts, in matters
with respect to which they are silent" (section 652) and in a case
noted it is said, "Usage enters into every contract and may be shown
not only for the purpose of elucidating the contract but also of
completing it," and in section 660 it is said, "The real question where
usage is concerned is whether the parties contracted with reference
thereto," and "a habit of business confined to the two parties to a
contract may by implication be adopted as an unexpressed part
of it."

In this instance the parties had adopted a plan calculated to meet
the exigencies of the situation; it involved the fixing of prices at
approximately the first of each month; it had been followed for
a considerable time with apparent satisfaction to both parties; prices
had been determined on the same basis whether determined between
the parties or fixed, as was done for four months, by the Food
Administration, and there can be no doubt of the understanding
by both parties that, upon the same basis as had prevailed theretofore,
the price of the bacon for January, February, and March de-
liveries would be cost with the addition of the profit allowed under
the regulations of the Food Administration.

There is yet another contention for consideration, and it may best
be stated by quoting from defendant's brief, wherein it is said:

"After the transmission of the telegram of December 16, 1918, from the War Department to the Depot Quartermaster at Chicago, and for the months of January and February, 1919, supplies were only purchased after the issuance of circulars of proposal sent out to prospective contractors for various kinds of bacon issue, and inviting the submission of bids on or before a given date. In case a bid was accepted, the award or contract was made and contract entered into in accordance with section 3744 Rev. Stat., paragraph

6895 Comp. Stat., the act of June 2, 1862, c. 93, 12 Stat. 411, 93 and acts amendatory thereof and supplemental thereto, signed by the duly authorized contracting officers for both parties at the end thereof, and the same were duly approved by the Board of Contract Review. No circulars were distributed, awards made, purchase orders issued or contracts entered into for bacon to be delivered in the month of March, 1919."

The telegram referred to, and reference is made to it elsewhere in the brief, is apparently treated as requiring thereafter that supplies be purchased upon submission of competitive bids, formal contracts, etc., a procedure which it is said was followed as to the bacon for January and February deliveries, but not as to March. The contention tends strongly to raise a question as to counsel's sincerity, but we prefer rather to treat the matter as a misapprehension of the situation.

This telegram as to the identity of which there can be no mistake since it is referred to not only by date but by record page, is set out in Finding XXII. It was to General Kniskern and the signature was "Wood," acting quartermaster general and director of purchase and storage, and "Baker," chief of the subsistence division. The meaning, in the light of all the attendant circumstances, seems too clear to justify discussion. But the question is raised.

The fact is found that after the armistice the Food Administration began to "taper off," (quoted from a witness) for the purpose of discontinuing its activities as soon as possible and that it made no further allotments of meat products and fixed no prices after those for December, 1918. We have discussed the purpose and effect of allotments and it appears that the Food Administration had made allotments for January, February, and March, 1919. It had fixed prices for September, October, November, and December, 1918. Previous thereto prices had been determined as already described. The time was near for the fixing of prices for January, the Food Administration was going out of business, it was therefore necessary that the Army should proceed independently of that organization, and, very significantly, General Kniskern was authorized to proceed accordingly. What duty could devolve on General Kniskern that had been previously discharged by the Food Administration? What had been its functions? To make allotments, which it had made for January, February, and March and which had not been revoked, and to fix prices near the beginning of each month. This latter was its sole unexercised function as to these months. General Wood and

the chief of the subsistence division were fully informed as to the procedure before this function was taken over by the Food Administration and, that body having abandoned this function, the telegram could have meant nothing else than that General Kniskern was authorized to proceed to fix prices as theretofore. This was the interpretation put upon it and this is what General Kniskern did.

Reference is made to the sending out of circulars of proposal inviting the submission of bids for January and February. We have already discussed the use of these proposal forms as a part of the adopted procedure for the fixing of prices, a use based on convenience and contemplated to be for the purpose only of procuring the submission of the proposed prices on products already allotted and not for the purpose of procuring competitive bids and their use

for January and February was no different. Bearing in
94 mind the nature of the product and the time necessary for its preparation, the unreasonableness of a theory that supplies for January and February were being procured by bid, acceptance and formal contract is apparent.

The statement quoted omits mention of the usual purchase orders which were issued just as they had been theretofore, except that the purchase order for January was in some way defective and was corrected by one of later date, and served the same purpose as they had theretofore when there were no formal contracts. Why someone concluded to prepare formal contracts thereafter can only be surmised. They were in effect retroactive or possibly nunc pro tunc. The contracts for January bore date February 10, and did not receive the approval of the Board of Contract Review, urged as absolutely essential, until February 26, although all deliveries had been completed February 11. The formal contract for February recites that it is made "as of the fourth day of February, 1919," the date upon which a purchase order was issued, but it did not receive the approval of the Board of Contract Review until March 1.

We are constantly mindful of the fact, as stated before, that January and February deliveries are not involved in this suit, but it has seemed necessary to review the whole situation to get the correct view of this contract and the procedure thereunder and particularly of that part thereof relating to March deliveries. It should perhaps be added that the reason why no blank proposals were sent out soliciting price on March deliveries, no price was proposed, and no purchase orders issued is obvious. The action taken as indicated by the letter of February 5, 1919 (Finding XIX), interrupted this usual course of procedure and left the situation as one for future adjustment as the rights of the parties should be determined. Naturally if otherwise necessary, which is not conceded, there was thereafter no formal contract covering contemplated supplies for March, such as those subsequent contracts referred to in Finding XXII as to January and February deliveries. The rights of the parties were to be determined under the existing contract, if there was one, and if there was, none other was necessary.

The lengthy consideration given the circumstances of this case and the law apparently applicable thereto has served but to strengthen the conclusion reached that upon the theory presented there was a valid contract between the plaintiff and the United States covering the subject matter of this action.

There are other theories upon which plaintiff assert a right of action but, having reached the conclusion stated above, we shall not regard it necessary to discuss them in detail.

There is the theory, possibly not without merit, that this was an emergency contract within section 3709 R. S., and hence not within the provision of section 3744. That there was an emergency can hardly be questioned. The order of the Secretary of War so declared, it was a matter of common knowledge and common sense, and the definitions and declarations of the Supreme Court are conclusive. Am. Smelting and Refining Co., *supra*. Emergencies, it is said, can not be measured, and "immediate" applied to delivery does not necessarily mean a day or a week but is to be defined in its relation to the circumstances and the nature of the article. And it

is difficult to find application for the language of the last half
95 of the section if it does not set up a rule for itself, without the restrictions of and unaffected by 3744. But on the other hand this section has sometimes been held to relieve only from the necessity of advertising. If we had not reached the conclusion already stated on another theory of this case we must necessarily determine the scope and effect of 3709. As it is, we need not decide the question.

Plaintiff also asserts a cause of action in two different phases under the Dent Act. The first theory is that out of these various conferences between General Kniskern and Major Skiles, on the one hand, and the representatives of the seven big packers, upon whom dependence for necessary supplies of bacon and canned meats must necessarily be placed, on the other, there arose a contract for capacity production under which the packers agreed to produce bacon to capacity and the United States agreed to take their entire production.

There is considerable testimony in the record, and undisputed in fact, sustaining the contention that there was such an agreement. To the officers charged with the duty of procuring adequate supplies, in the face of the enormous and constantly increasing demand, the problem was to get enough, they were urging increased production, and unquestionably represented that they would take all the packers could produce. And yet their conduct of affairs seems to negative the idea that they were proceeding under such a contract.

Had they been so doing it would seem that there would have been nothing to do but for the packers to produce to capacity and the Government to take that production be it more or less, and cover it with its purchase orders. But while for much of the time they did take and were no doubt glad to get all that was produced, they constantly adhered to the practice of receiving proposals from each packer and issuing authorizations or acceptances indicating the amount they were to furnish for each period involved. We can not

conclude that they were proceeding under a contract for capacity production.

The second count on the theory of an action under the Dent Act declares upon the statements made to the packers by General Kniskern at the conference of November 9, 1918, with the averment that immediately thereafter, because thereof, and pursuant to the capacity production agreement, the packers, plaintiff included, commenced production of bacon of the required specifications and made expenditures and incurred obligations in that behalf before November 12, 1918.

No doubt at the time of and immediately following this conference and before November 12 the plaintiff was putting up Army bacon, and, continuing the purchase of hogs when the needs for January, February, and March were made known, it is shown that on November 10 they purchased hogs from which bacon was made for January delivery, but it would be wholly inconsistent with our view of this case and with the facts as we see them to hold that they then and before November 12 made any attempt or had an intention of entering into a contract which might by any possibility be within the purview of the Dent Act. Some things said above with reference to the first Dent Act theory are applicable here.

Claim was presented upon this theory to the War Department Board of Contract Adjustment and, while the claim upon its 96 merits seemed to appeal favorably to the Board, it was disallowed on the ground that no agreement had been made with the plaintiff prior to November 12, a conclusion which was affirmed by the Secretary of War on appeal and which we regard as correct.

The other theory is that the allotment made by the Food Administration was a compulsory order, in effect a commandeering, in connection with which stress is laid on the letter of the President set out in Finding XIV, the circumstances attending its writing being also set out in response to a request of the defendant. We have already indicated our views as to the authority of the Food Administration and the effect of an allotment, and in our opinion the contention of the plaintiff in this respect is not well founded. Further, attention may be called to the fact that the copy of the allotment sent to the plaintiff called for an acceptance. "No acceptance was necessary if the order was a compulsory requisition." Am. Smelting and Refining Co., *supra*.

The defendant, in addition to vigorously contesting the claims of the plaintiff, has filed a counterclaim based on the transactions between the plaintiff and the defendant in the furnishing of bacon during the six months from September, 1918, to February, 1919, both inclusive.

The alleged indebtedness of the plaintiff to the defendant is \$1,571,882.00, consisting of "certain improper and illegal charges presented by the plaintiff to the defendant on account of Army bacon, delivered from September, 1918, to February, 1919, both inclusive, which charges were, by mistake, paid by the defendant

to the plaintiff in the settlement of the bills and accounts so presented," followed by a statement in detail as to each of the six months in which is included alleged overvaluation of green bellies, overcharge for shrinkage, and improper inclusion of items in the nature of overhead, in determining cost.

The fact that nothing of illegality in the contracts for these six months is urged attracts attention, in view of vigorous contentions in opposition to plaintiff's asserted rights, and we are not informed why this is so. The adoption of the theory above suggested as to the effect of performance would furnish a plausible explanation. And why the line should be drawn between August and September, 1918, and no claim asserted on account of transactions on the same basis back of September is not apparent.

While we have, of course, given careful consideration to the evidence as well as the arguments in support of the counterclaim it has seemed not only an extended but an unnecessary task to attempt to cover the transactions of these six months by detailed findings and we have stated the ultimate facts as we see them.

The cost of green bellies has necessarily figured as the basic item in the cost of producing bacon during all these transactions and it is plainly apparent, not only from the record in this case but as a matter of common sense, that it is impossible to determine to a mathematical accuracy just how much a slab of bacon belly cost a packer who bought the whole hog. The plaintiff, by tests and by the application of reasonable processes of elimination has furnished a

basis apparently fair. It is met to a very considerable extent
97 by theories, none of which are any better founded, and some

of which emanate from those who are pure theorists without practical experience. This is wholly true as to the charge for shrinkage, for the claim in that respect is predicated on the deductions of expert accountants. The whole claim is based upon a theory of mistake on the part of those whose duty it was to guard the interests of the Government and yet, with these men available and in fact on the witness stand, we do not find them supporting a theory that they were in any manner imposed upon in these transactions. There is in our judgment an absence of any showing which would justify the opening up of these closed transactions and a charging back against the plaintiff.

In this connection we think it right and but a matter of common justice to call attention to the fact that while in the counterclaim itself the averment is that there was a "mistake," presumably on the part of Government officers, in the payment of these alleged overcharges, there are many statements in defendant's brief which far transcend this theory and cast serious reflection on the conduct of the plaintiff. These we believe to be unjustified and feel that it is but due the plaintiff that we should say so.

It is rare, indeed, that we have before us records exemplifying transactions of such extent and importance wherein the willingness

of contractors to cooperate with representatives of the Government is so constantly manifest. It was plainly their right to be compensated on the basis of full reimbursement of all cost of production with a profit added, which had been fixed by governmental authority. And when they agreed to furnish bacon at a price to be determined, and on a basis which precluded their fixing it except it meet the approval of General Kniskern, who was certainly at all times honestly and faithfully looking after the interests of the Government, they were certainly showing a proper spirit of cooperation. The practicing of deliberate deception in the matter of costs could furnish the only basis for criticism, and we find no foundation in the record for such a charge.

The big packers were the source of supply upon which reliance must be had. To them the appeal was made to meet the demand and the results answer for them as to their conduct. Army officers representing the Government and writing business letters to contractors rarely feel called upon to depart from the path of business and inject a personal note of appreciation, but when this great strain was over and General Kniskern realized that he had successfully met such an emergency as had never before presented itself, he added to his letter of January 24, 1919, to the plaintiff, this paragraph:

"Please accept the sincere thanks of this office for the hearty and loyal cooperation your firm has so generously given in the past, without which the difficulties of securing sufficient meat foods for the Army would have been well-nigh unsurmountable."

We can not but observe, in concluding our discussion of this case on its merits, aside from necessary results, that, viewing this whole situation as it existed for considerably more than a year, during which urgent needs demanded departure from established peace-time regulations, and during which, to meet those needs, faithful and efficient officers devised methods and those able to supply the needs cooperated willingly in making effective those methods, and during which those needs were met and the necessary supplies
98 promptly furnished from month to month, followed by acceptance and payment without objection, so far as appears, by any one to the method pursued, it would be passing strange, an inexplicable injustice, if by reason of the invoking of technicalities, making their appearance for the first time in this lawsuit, the plaintiff was to be left without any remedy as to supplies prepared for delivery under exactly the same conditions as had prevailed theretofore.

It remains to address ourselves to the measure of damages and some minor matters related thereto and so connected therewith that they may best be presented in that connection.

We have determined that the cost to the plaintiff of the serial No. 10 bacon put up for March delivery was \$48.07 per hundred pounds. To this we conclude that there should be added a profit of $2\frac{1}{2}$ per cent provided for under the regulations of the Food Administration applicable to licensed packers. The cost to the plaintiff with this

2½ per cent of profit added becomes in fact the contract price since it was agreed that the price, not stated in the writings, but reserved for future determination, should be the cost to the plaintiff with the stated percentage of profit added, and the uncertain element, that of cost, has been determined by our findings.

The plaintiff is, therefore, in stating an account, to be credited, as to the 3,328,776 pounds of bacon put up by Swift & Co. with that amount at \$48.07 per hundred pounds, viz., \$1,600,142.62, to which is to be added 2½ per cent thereof, viz., \$40,003.56, making a total of \$1,640,146.18.

There was put up in the plant of Squire & Co., at Boston, for the account of Swift & Co., 868,896 pounds of serial No. 10 bacon, and it is stated in a separate item, first, because of the contention that Swift & Co. has no valid claim on account thereof, and, second, because of a slight difference in applicable price.

The facts with reference to the status of Squire & Co. and the operation of that company in the production of a part of this bacon for Swift & Co. are to be found in Findings II and XXI, and we do not deem it necessary to discuss them here. We have no doubt that the bacon produced in the Squire plant is properly for inclusion herein to the credit of Swift & Co., the only difference arising from the fact that in all prices quoted and accepted or otherwise fixed or agreed upon, the price for Boston delivery was 50 cents per hundred (sometimes 70 cents) more than for Chicago delivery, a freight differential and an item properly to be computed as a cost item and resulting in a cost price of \$48.57 for Boston delivery as against \$48.07 for Chicago delivery. This price with the 2½ per cent of profit added becomes the price the plaintiff had agreed to pay Squire & Co., less one-half of 1 per cent as its retained part of the profit.

The plaintiff is therefore to be credited on account of the 868,896 pounds of bacon put up by Squire & Co. for its account with the amount at \$48.57 per hundred pounds, amounting, with 2½ per cent added thereto, to the sum of \$432,573.34, which, added to the first ascertained credit, makes a total on account of all serial 10 bacon of \$2,072,719.52.

As against this gross amount the plaintiff must, of course, be charged with the net amount realized or the amount which should have been realized from the sale of the bacon, and on this feature of the case the defendant contends that the plaintiff did not minimize damages as it should, citing the fact that it did not immediately put the bacon on sale and that whereas there was in the months of April, May, June, and July a "rising market" there was thereafter a falling and that plaintiff began to dispose of this bacon on a falling market.

No doubt, but for one very material fact, the measure properly to be applied to this side of the account would be "market value," but the material fact is that there was no market value in the true sense. This was not a commercial product, there was but one customer, and when that customer declined to take it there was no

market except as it might be created. This bacon was more expensive to manufacture than ordinary commercial bacon, and in some respects better, but it was a special product, not regarded by the consumer as desirable, and not in any sense comparable in the market to commercial bacon.

There was a rising hog market during the period, and for the reason chiefly as set out in Finding XXVIII, but its effect even upon the market for commercial bacon is not shown with any definiteness, and its effect, if any, upon army bacon is purely speculative.

It was the duty of the plaintiff, if it sought to lay a proper foundation for a charge against the Government, to sell to the best possible advantage, to minimize damages, but in determining whether it did its full duty in this respect, as we believe it did, all the circumstances are for consideration.

We have called attention to the fact that during these strenuous times the plaintiff always cooperated with the Government authorities and at all times complied willingly with requests as well as instructions. It had acquired a commendable habit of implicit obedience, and after its contract was terminated, with no protest on its part, and an adjustment was in order, it relied still on the officers with whom it had so long cooperated and awaited instructions. Without repeating too much of detail, reference to the letter of General Kniskern set out in Finding XXVI indicates that it had as yet been undetermined whether the Government would take the product in question and thus settle the matter, or allow the plaintiff to retain and dispose of it on a salvage basis, and in that letter advising sale plaintiff is officially informed of the price at which the Government was offering similar product for sale, an important circumstance in connection with the course adopted by the plaintiff to avoid cutting under and thus unfairly competing with the Government. The methods adopted by the plaintiff and its procedure thereunder are set out in Finding XXVIII, and we think need not be repeated. If we were to attempt to put on paper what the plaintiff should have done rather than what it did, the futility of the attempt, as we see it, would furnish the strongest possible argument in support of the conclusion that the situation was handled as well as could be.

From the sale of the entire 4,197,672 pounds of serial No. 10 bacon the plaintiff realized gross, \$1,062,847.54, with which it is to be charged, less such expenses of sale as may be found to be properly deductible to arrive at the proper net proceeds.

In Finding XXIX are set out the items of expense claimed, followed by a brief explanatory note as to the several items.
100 The allowance or otherwise of some of these items may not be so determined as to rid the conclusion of all possible doubt, but it is our view, well founded we think, that the third, fourth, and fifth items, viz., storage charges, insurance, and interest, must be eliminated, and the allowance for expenses of sale limited to items

one, two, and six, viz, transportation expenses, selling expenses, and miscellaneous, aggregating \$62,791.73, which sum deducted from the gross proceeds of sales, \$1,062,847.54, leaves as net proceeds \$1,000,055.81 to be charged against the plaintiff which, deducted from the gross credit of \$2,072,719.52, leaves to plaintiff as a net credit on account of all serial No. 10 bacon, \$1,072,663.71.

We have determined the cost to the plaintiff of the salt bellies which it was not permitted to put in smoke at \$37.41 per hundred pounds. The 417,881 pounds at the Swift plant amounted at this figure to \$156,329.28 and the 650,658 pounds at the Squire plant for which Swift & Co. was liable to Squire & Co., at the same figure, to \$243,411.15, a total of \$399,740.43.

The details as to the sale of these bellies are set out in Finding XXX. It there appears that 65,225 pounds of these bellies were sold in the United States, for which \$21,796.13 was realized, an average price of \$33.41 per hundred. The conclusion that these were fairly good sales and for the best obtainable price is justified, without argument, and it follows that as to this quantity the plaintiff is entitled to a credit for the cost to it of 65,225 pounds at \$37.41 per hundred, \$24,400.67, less \$21,796.13 received from sales, viz, \$2,604.54.

The larger part of the salt bellies were shipped abroad and in Finding XXX is shown the dates and destinations of these shipments and, in a tabulation, the details of the sales made. This tabulation shows a rather disastrous result of this venture, particularly as to the sales in France where much the larger part of this product was sent.

This situation seems rather to require for what, if anything, it may be worth, a matter of justice if nothing more, the statement that to us it seems quite clear that in seeking a foreign market for this product plaintiff was acting in perfect good faith, and in accordance with its best judgment, based on former experiences in exporting and information then at hand as to markets to be anticipated abroad. It shipped with this product other products of its own on which it suffered heavy losses.

But we are of the opinion that its good faith in this respect, the fact that it exercised its best judgment, can not relieve it from the consequences of its error in seeking a foreign market. It is true that it does not appear that it could have made other sales on the basis of those made in New York; on the contrary it is rather to be implied that other purchasers were not then available and that the one found would not buy further, but it seems to us that it was the duty of the plaintiff to have relied upon the home market and to have taken such steps that it might show that it had exhausted that market before resort to a foreign one, and that, in the absence of such a showing, it assumed the risk of procuring such results as would demonstrate that the course taken had resulted beneficially to the other party.

Under the circumstances we can not conclude that the plaintiff
is entitled to measure its recovery against the United States
101 by the results of these foreign sales, and if not so entitled, it
has furnished us no other standard and must therefore, in this
respect, be precluded from recovery.

The question raised as to the overcuring of these bellies and its
results is eliminated from necessary discussion by the conclusion
just stated.

To the amounts already determined in favor of the plaintiff, viz, \$1,072,663.71 on account of serial 10 bacon, and \$2,604.54 on account of 65,225 pounds of salt bellies, there is to be added \$2,118.05 on account of the difference between the cost price of certain materials and their salvage value (*Finding XXXII*), making a total of \$1,077,386.30, for which we have awarded judgment.

GRAHAM, Judge; HAY, Judge; BOOTH, Judge, and CAMPBELL,
Chief Justice, concur.

VII. *Judgment*

At a Court of Claims held in the city of Washington on the 17th day of March, A. D. 1924, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff and do order, adjudge, and decree that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of one million, seventy-seven thousand, three hundred and eighty-six dollars and thirty cents (\$1,077,386.30).

By the Court.

IX. *Proceedings after entry of judgment*

On May 13, 1924, the defendant filed a motion to amend the court's findings of fact.

On May 16, 1924, the plaintiff filed a motion for a new trial.

On October 6, 1924, the defendant filed a motion to amend its motion to amend the court's findings.

On October 13, 1924, the court allowed the defendant's motion of October 6, 1924, and said amended motion was filed.

On October 14, 1924, the defendant's motion to amend findings and for a new trial, and plaintiff's motion for a new trial, were argued and submitted by Messrs. J. Robert Anderson, Charles F. Jones, and Ollie R. McGuire, for the defendant, and by Mr. G. Carroll Todd, for plaintiff.

On October 28, 1924, the court entered the following order on said motions:

ORDER OVERRULING MOTION FOR NEW TRIAL

It is ordered by the court this 28th day of October, 1924, that the plaintiff's motion for new trial and to amend findings and the defendant's motion for new trial and for amendment of findings be and the same are severally overruled.

103 *X. Petition for appeal. Filed January 22, 1925*

From the judgment rendered in the above-entitled cause on the 28th day of October, 1924, in favor of claimant, the defendants, by their Attorney General, on the 22nd day of January, 1925, make application for, and give notice of, an appeal to the Supreme Court of the United States.

IRA K. WELLS,
Assistant Attorney General.

XI. Order allowing petition for appeal

On January 26, 1925, it was ordered, in open court, that the above application for appeal be allowed as prayed for.

104 *XII. Plaintiff's application for cross appeal. Filed January 23, 1925*

Judgment was entered for the plaintiff in the above-entitled cause on the 17th day of March, 1924, following which, and within the time prescribed by the rules, motions for a new trial were made by the plaintiff and the defendant, both of which were overruled by an order entered on the 28th day of October, 1924.

From this judgment the plaintiff, by its attorneys, this 23rd day of January, 1925, makes application for, and gives notice of an, *an* appeal to the Supreme Court of the United States.

GREGORY & TODD,
Attorneys for Plaintiff.

XIII. Order allowing plaintiff's application for cross appeal

On January 26, 1925, it was ordered, in open court, that the above application for cross appeal be allowed as prayed for.

105 *In Court of Claims*

[Title omitted.]

Clerk's certificate

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Downey,

J.; of the judgment of the court; of the proceedings after the entry of judgment; of the applications of the defendant and plaintiff for an appeal to the Supreme Court of the United States and of the orders of the court allowing said applications.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 26th day of January,
A. D. 1925.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

[Indorsed on cover:] File No. 30,885; 30,886. Court of Claims.
Term No. 920, the United States, appellant, vs. Swift & Company.
Term No. 921, Swift & Company, appellant, vs. the United States.
Filed February 20th, 1925. File No. 30,885; 30,886.

(9) Office Supreme Court, U. S.
FILED

NOV 23 1925

WM. R. STANSBURY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1925.

No. 288

THE UNITED STATES, APPELLANT,

v.

SWIFT & COMPANY.

No. 289

SWIFT & COMPANY, APPELLANT,

v.

THE UNITED STATES.

ON APPEAL AND CROSS APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR SWIFT & COMPANY.

	CONTENTS.	Page
Statement of the Case.....		1-15
Decision of the Court of Claims.....		15-16
Assignment of Errors.....		16-17
The Respective Contentions.....		17-18
Points of Argument.....		18-19
The Argument.....		20-163
Point I. The transaction commencing with Swift & Company's offer of November 12, 1918, and concluding with the Depot Quartermaster's order of December 10, 1918, accepting the offer, constituted a contract good under the general law.....		20-26
Point II. A contract resulted from the foregoing offer and acceptance none the less because a so-called purchase order was to be issued later..		26-31
Point III. The statutes requiring contracts made by the Secretary of War or the Quartermaster General or any officer under them to be reduced to writing and signed by the parties were complied with.....		31-58
Point IV. In any event the contract was so far executed as not to be within the operation of the statutes requiring contracts made by the Secretary of War or the Quartermaster General or any officer under them to be in writing and signed by the parties.....		59-86
Point V. Contracts made in time of war or when war is imminent or to meet an emergency as this one was come within § 120 of the National Defense Act and/or § 3709 of the Revised Statutes, neither of which requires a written contract		86-104
1. National Defense Act, § 120.....		86-96
2. Revised Statutes, § 3709.....		96-104
Point VI. The dealings between the United States and Swift & Company prior to November 12, 1918, constituted an agreement for Swift & Company's capacity production of Army bacon, subject to the right of the United States by due notice to stop production or reduce the quantity, which agreement is enforceable against the United States under the Dent Act.....		105-119
Point VII. The finding of the Court of Claims that General Kniskern, Depot Quartermaster and Zone Supply Officer at Chicago, who entered into this contract on behalf of the United States, had full authority to make contracts for meat supplies for the Army, is not reviewable and is right in any event.....		120-135

1. The finding is not reviewable.....	120-123
2. The finding is right.....	123-135
Point VIII. The contention that the contract was abrogated "by mutual consent of the parties in submitting proposals and bids and entering into formal contracts for January and February deliveries is contrary to the facts as found by the Court of Claims".....	135-141
Point IX. The Court of Claims was right in taking as the measure of damages with respect to the 4,197,672 pounds of canned bacon, i. e., the finished product, the difference between the contract price and the net proceeds of the resale	141-145
Point X. The finding of the Court of Claims that Swift & Company exercised due diligence in reselling the 4,197,672 pounds of canned bacon after the United States refused to take it is not reviewable and is right in any event. 147-155	
1. The finding is not reviewable.....	147
2. The finding is right.....	147-155
Point XI. The judgment should be modified by including the amount of the loss sustained by Swift & Company on the 1,003,313 pounds of cured or salt bellies resold in European markets... 155-163	
Conclusion	163
<hr/>	
Appendices	164-187
Appendix A. A contract resulted from the Food Administration's allotment order of December 3, 1918, placed at the request of the Depot Quartermaster, and Swift & Company's acceptance thereof.....	164-172
Appendix B. Cases in the Court of Claims bearing on the question whether contracts entered into under authority of Revised Statutes, § 3709, in times of public exigency, are subject to Revised Statutes, § 3744, requiring contracts with the War, Navy and Interior Departments to be reduced to writing, etc.	172-178
Appendix C. Cases before the War Department holding that a request by a duly authorized officer for the performance of work or services, followed by entry upon performance prior to November 12, 1918, gave rise to an implied in fact agreement under the Dent Act	178-187

CASES CITED.

	Page
Ackerlind v. United States, 240 U. S. 531.....	79
Acme Food Co. v. Older, 64 W. Va. 255, 17 L. R. A. (N. S.) 807.	76
Adams v. United States, 7 Ct. Cl. 437.....	42
Alcoholic Products Co., Claim of, Decs. War Dept. Bd. Cont. Adj., VIII, p. 114.....	111, 185
Allen v. United States, 5 Ct. Cl. 339.....	121
American Lumber & Mfg. Co. v. Atlantic Mill & Lumber Co., 290 Fed. 630.....	22
American Smelting & Refining Co. v. United States, 259 U. S. 75	27, 28, 42, 56, 98, 140
American Sponging Co., Claim of, Decs. War Dept. Bd. Cont. Adj., Vol. V, p. 387.....	107, 111, 182
Amoskeag Mfg. Co. v. United States, 17 Wall. 592.....	39, 41
Argus Co. v. City of Albany, 7 Lans. 264, Aff. 55 N. Y. 495....	50
Armour & Co. v. Sherburne Co., 300 Fed. 81.....	65
Atkinson v. Bell, 8 B. & C. 277.....	75
Atlantic City R. R. Co. v. United States, 58 Ct. Cl. 215.....	121
Baird v. United States, 131 U. S. CVI (Appendix), 21 L. ed. 519	40
Baker's Case, 3 Ct. Cl. 343.....	99
Baltimore & Ohio R. R. Co. v. United States, 261 U. S. 592..	108, 121
Bayne v. Wiggins, 139 U. S. 210, 35 L. ed. 144.....	48
Bement v. Smith, 16 Wend. 492.....	64
Bibb v. Allen, 149 U. S. 481.....	49
Billings v. United States, 232 U. S. 261.....	40
Birdsong v. Jordan, 297 Fed. 742.....	74
Black River Lumber Co. v. Warner, 93 Mo. 374.....	64
Bookwalter v. Clark, 10 Fed. 793.....	64, 68, 142
Bradley v. Washington, etc., Packet Co., 13 Pet. 89.....	36, 50
Brandeis v. United States, 3 Ct. Cl. 99.....	40
Briggs & Stratton Co., Claim of, Decs. War Dept. Bd. Cont. Adj., Vol. II, p. 789.....	110, 178
Broadbent Laundry Corp. v. United States, 56 Ct. Cl. 128....	121
Brown v. District of Columbia, 127 U. S. 579, 32 L. ed. 262	46, 56, 140
Brown v. Jerome, 298 Fed. 1.....	27
Buffalo Iron Furnace Co. v. U. S. Shipping Board Emergency Fleet Corp., 291 Fed. 23, C. C. A. 2nd.....	93
Burdette Mfg. Co., Claim of, Decs. War Dept. Bd. Cont. Adj., Vol. II, p. 317.....	111, 184
Carlyle Commission Co., Claim of, Decs. War Dept. Bd. Cont. Adj., Vol. VII, p. 1011.....	115
Carter Co., William, Claim of, Decs. War Dept. Bd. Cont. Adj., Vol. V, p. 203.....	25, 134

Caso Tanning Co., Claim of, Dees. War Dept. Bd. Cont. Adj., Vol. V, p. 79.....	107, 111, 181
Castle Creek Water Co. v. City of Aspen, 146 Fed. 8.....	25
Chase v. United States, 155 U. S. 480.....	117
Chicago, Minneapolis & St. Paul R. R. Co. v. United States, 218 Fed. 295.....	88
Church of the Holy Trinity v. United States, 143 U. S. 457.....	
Ceballos v. United States, 42 Ct. Cl. 318.....	99, 177
Central Georgia Power Co. v. Butts County, 139 Ga. 490.....	50
City of California v. Bunceton Telephone Co., 112 Mo. App. 722, 87 S. W. 604.....	50
City of Chicago v. Greer, 9 Wall. 726, 19 L. ed. 769.....	22
Clark v. United States, 95 U. S. 539, 24 L. ed. 518.....	36, 38, 42, 50, 56, 76, 175
Clarkson v. Stevens, 106 U. S. 505.....	69
Cleveland Tanning Co., Claim of, Dees. War Dept. Bd. Cont. Adj., Vol. V, p. 226.....	181
Cobb, Blasdell & Co.'s Case, 18 Ct. Cl. 514.....	174, 177
Cobb's Case, 9 Ct. Cl. 291.....	99
Cobb, Christy & Co.'s Case, 7 Ct. Cl. 470.....	99, 104, 174
Consolidation Coal Co. v. United States, decided Jan. 26, 1925..	91
Cowdrey Machine Works, Claim of, Dees. War Dept. Bd. Cont. Adj., Vol. III, p. 135.....	110, 179
Cramp v. International, etc., Co., 246 U. S. 28.....	112
Detroit Copper & Brass Rolling Mills v. Wise, 297 Fed. 460...	22
District of Columbia v. Barnes, 197 U. S. 146.....	80
District of Columbia v. Camden Iron Works, 181 U. S. 453, 45 L. ed. 948.....	58, 63
District of Columbia v. Hutton, 143 U. S. 18.....	33
Dougherty v. United States, 18 Ct. Cl. 496.....	117
Drummond v. Crane, 159 Mass. 577, 38 Am. St. Rep. 460.....	27
Dustan v. McAndrews, 44 N. Y. 72.....	158
Dusenberg Motors Co. v. United States, 260 U. S. 115.....	67
Eastern Steel Co., Claim of, Dees. War Dept. Bd. Cont. Adj., Vol. VI, p. 612.....	172
Erie Coal & Coke Corp. v. United States, 266 U. S. 518.....	55
Federal Sugar Refining Co. v. United States, decided January 19, 1925.....	91
Fisher Hydraulic Stone & Machinery Co. v. Warner, 233 Fed. 527	64, 143
Floyd's Acceptance, 7 Wall. 666.....	121
Foster & Stewart Co., Claim of, Dees. War Dept. Bd. Cont. Adj., Vol. V, p. 272.....	111, 182
Freund v. United States, 260 U. S. 60.....	80
Frederick v. American Sugar Refining Co., 281 Fed. 305..	144, 151, 154
Frieberg Mahogany Co. v. Batesville Lumber, etc., Co., 285 Fed. 485	144

Garcia & Maginna Co. v. Washington Dehydrated Co., 294 Fed.	
765	151
Garfield v. United States, 93 U. S. 242, 23 L. ed. 779.....	27
Gibson v. United States, 194 U. S. 182, 48 L. ed. 926.....	33
Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112.....	68
Graton & Knight Mfg. Co., Claim of, Dees. War Dept. Bd. Cont.	
Adj., Vol. VI, p. 764.....	181
Green & Hickey Leather Co., Claim of, Dees. War Dept. Bd.	
Cont. Adj., Vol. V, p. 649.....	181
Halstead v. The Minnesota Tribune Co., 174 Minn. 294.....	50
Ham, W. D., Claim of, Dees. War Dept. Bd. Cont. Adj., Vol.	
VII, p. 556.....	111, 185
Hamilton v. Kentucky Distillery & Warehouses Co., 251 U. S.	
146	87
Hardy v. United States, 9 Ct. Cl. 244.....	64
Harriman Industrial Corp., Dees. War Dept. Bd. Cont. Adj.,	
Vol. V, p. 463.....	111, 183
Harvey v. United States, 105 U. S. 671.....	27
Hayden v. Demets, 53 N. Y. 426.....	74
Horton v. United States, 57 Ct. Cl. 395.....	121
Houston Coal Co. v. United States, 226 U. S. 361.....	165
Howell v. Grocers, Inc., 2 F. (2d) 499.....	23
Industrial Engineering Co. v. United States, decided Feb. 16,	
1925	121
Johnson v. Southern Pacific Co., 196 U. S. 1.....	111
Johnston v. United States, 41 Ct. Cl. 76.....	99, 174
Jones v. United States, 11 Ct. Cl. 733.....	50, 79
Joy v. St. Louis, 138 U. S. 1.....	25
Kawin & Co. v. American Colortype Co., 243 Fed. 317.....	74
Kinkead v. Lynch, 132 Fed. 692.....	64, 70, 144
Lackawanna Steel Co., Claim of, Dees. War Dept. Bd. Cont.	
Adj., Vol. I, p. 740.....	170
Langrock Bros. & Co., Dees. War Dept. Bd. Cont. Adj., Vol.	
V, p. 688.....	111, 183
La Roque v. United States, 239 U. S. 62.....	187
Lawrence & Morrisanna Steamboat Co., 12 Fed. 850.....	36
Lee v. United States, 4 Ct. Cl. 156.....	40
Lichtman & Sons, Claim of, Dees. War Dept. Bd. Cont. Adj.,	
Vol. V, p. 221.....	107, 111, 181
Leyner, J. George, Engineering Works v. Mohawk Consol. Leas-	
ing Co., 193 Fed. 745.....	70, 144
Magnuson v. Wagner, 1 F. (2d) 99.....	101
Mahan v. United States, 4 Wall. 100.....	122
Malcomson v. Reeves Pulley Co., 167 Fed. 939.....	76
Manhattan, etc., Railway Co. v. General Electric Co., 226 Fed.	
173	64, 144
Martin v. United States, 28 Ct. Cl. 137.....	121

Maryland Steel Co. v. United States, 235 U. S. 451, 59 L. ed.	
312	58, 63
Medkirk v. United States, 45 Ct. Cl. 395.....	88
Mellea, In re, 5 F. (2d) 687.....	87
Memphis Fur. Mfg. Co. v. Wemyss Fur. Co., 2 F. (2d) 428....	25
Meyerle v. United States, 33 Ct. Cl. 1.....	117
Miller v. Robertson, decided Nov. 17, 1924.....	142
Moline Scale Co. v. Beed, 52 Ia. 307.....	64
Montclair Township v. Ramsdell, 107 U. S. 147.....	101
Moody v. Brown, 34 Me. 107, 56 Am. Dees. 640.....	75
Moore & Tierney v. Roxford Knitting Co., 250 Fed. 278; aff.	
265 Fed. 177; certiorari refused, 253 U. S. 498.....	87
Moran Bros. Co. v. United States, 39 Ct. Cl. 486.....	99, 176
Morgan Engineering Co. v. United States, 58 Ct. Cl. 373.....	121
Mott v. United States, 9 Ct. Cl. 257.....	121
Mowry's Case, 2 Ct. Cl. 68.....	99
McCollum v. United States, 17 Ct. Cl. 92.....	88, 119
McElrath's Case, 102 U. S. 436.....	88
McElwee et al. v. Metropolitan Lumber Co., 69 Fed. 302.....	69
McLean v. United States, 226 U. S. 374.....	112
McLean v. United States, 17 Ct. Cl. 83.....	40
National Vaccine & Antitoxin Institute, Dees. War Dept. Bd.	
Cont. Adj., Vol. IV, p. 277.....	107, 111, 180
Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366.....	85, 116
Norris v. M. H. Reed & Co., 278 Fed. 19.....	27
Northern Pacific R. R. Co. v. State of Washington, 222 U. S.	
370	112
Oceanic Steamship Navigation Co. v. Stranahan, 214 U. S. 320..	112
Omnia Commercial Co. v. United States, 261 U. S. 502.....	106
Pacific Steam Whaling Co.'s Case, 36 Ct. Cl. 105.....	99, 174
Parish v. United States, 100 U. S. 500.....	133
Peek v. Jenness, 7 How. 612.....	101
Pfau Mfg. Co., Claim of, Dees. War Dept. Bd. Cont. Adj.	
Vol. VIII, p. 213.....	111, 185
Pirle v. Chicago Title & Trust Co., 182 U. S. 438.....	53
Pontifex v. Farham, 62 L. J. Rep. (Q. B. 1892) 345.....	50
Pope v. Allis, 115 U. S. 362.....	59
Reynolds, R. J., Tob. Co. v. United States, decided Feb. 9, 1925.	91
Rodgers v. United States, 185 U. S. 83.....	102
Ruffee v. United States, 15 Ct. Cl. 291.....	40
Sager & Sloteroff, Claim of, Dees. War Dept. Bd. Cont. Adj.	
Vol. VII, p. 649.....	111, 185
St. Louis Hay & Grain Co. v. United States, 191 U. S. 159....	56
Sanders v. Pottlitzer Bros., 144 N. Y. 209, 39 N. E. 75, 29	
L. R. A. 431.....	27
Salomon v. United States, 19 Wall. 17.....	58, 63
Savage Arms Corp. v. United States, 57 Ct. Cl. 71.....	121

Sawyer Tanning Co., Claim of, Decls. War Dept. Bd. Cont. Adj., Vol. II, p. 382.....	107, 110, 178
Shawhan v. Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313.....	64
Small & Co. v. American Sugar Refining Co., decided March 2, 1925.....	156
Small & Co. v. Lamborn & Co., decided March 2, 1925.....	146, 147, 150, 156
Smith v. Wheeler, 7 Ore. 49.....	71
Salomon v. United States, 7 Ct. Cl. 482.....	42
South Boston Iron Co. v. United States, 118 U. S. 37.....	51
Sowell v. Federal Reserve Bank of Dallas, decided May 25, 1925	41
Speed's Case, 8 Wall. 77.....	177
Stafford v. Wallace, 258 U. S. 495.....	111
Standard Oil Co. of N. J. v. Southern Pac. Co., decided April 20, 1925.....	145
Stewart v. Kahn, 11 Wall. 493, 20 L. ed. 176.....	53
Stroots & Co., Claim of, Decls. War Dept. Bd. Cont. Adj., Vol. III, p. 359.....	172
Susquehanna Webbing Co., Claim of, Decls. War Dept. Bd. Cont. Adj., Vol. III, p. 629.....	107, 110, 111, 179
Thompson's Case, 9 Ct. Cl. 187.....	99, 174
Tolman, Dow & Co., Claim of, Decls. War Dept. Bd. Cont. Adj., Vol. V, p. 267.....	181
Travers v. United States, 5 Ct. Cl. 329.....	173
Trostel & Son's Co., Claim of, Decls. War Dept. Bd. Cont. Adj., Vol. V, p. 309.....	181
Turner-Looker Co. v. Aprile, 234 N. Y. 517; aff. 195 App. Div. 706	73
Union Pacific Railway Co. v. McAlpine, 129 U. S. 305.....	78
Union Twist Drill Co. v. United States, 59 Ct. Cl. 909.....	58
United States v. Andrews Paper Co., 207 U. S. 229.....	56, 59, 67, 77, 147
United States v. Behan, 110 U. S. 338.....	152
United States v. Berdan Firearms Mfg. Co., 156 U. S. 552....	25
United States v. Bostwick, 94 U. S. 53, 24 L. ed. 65.....	40
United States v. Cornell Steamboat Co., decided March 2, 1925	44
United States v. Daniels, 279 Fed. 844.....	101
United States v. Diamonds, 139 Fed. 960.....	101
United States v. Eliason, 16 Pet. 302.....	88
United States v. Greathouse, 166 U. S. 601.....	102
United States v. Hammers, 221 U. S. 220.....	187
United States v. Hermanos y Compania, 221 U. S. 220.....	187
United States v. Houston, 273 Fed. 915.....	167
United States v. Jones, 131 U. S. 1.....	80
United States v. Milliken Imprinting Co., 202 U. S. 168.....	80

	Page
United States v. New York & Porto Rico S. S. Co. , 239 U. S. 88	50, 54, 78
United States v. Omaha Tribe of Indians , 253 U. S. 275.....	123
United States v. Purcell Envelope Co. , 249 U. S. 313.....	27, 28
United States v. St. Paul, etc., R. R. Co. , 247 U. S. 310.....	112
United States v. Speed , 8 Wall. 77.....	99
United States v. Wilkins , 6 Wheat. 135.....	25
Updegraff's Case , 8 Ct. Cl. 514.....	174
Valpy v. Gibson , 4 C. B. 837.....	25
Vulcan Trading Corp. v. Kokomo Steel & Wire Co. , 268 Fed. 913	86, 116
Waples & Co. v. Overaker & Co. , 77 Tex. 7, 13 S. W. 527.....	158
Warner v. Texas & Pacific R. R. Co. , 164 U. S. 418.....	119
Washington v. Miller , 235 U. S. 422.....	102
Watson, The S. L. , 118 Fed. 945.....	148
Wentworth's Case , 5 Ct. Cl. 302.....	99, 173
White Walnut Coal Co. v. Crescent C. & Mining Co. , 254 Ill. 368	158
Widen, etc., Co. Claim of, Dees. War Dept. Bd. Cont. Adj. Vol. VIII, p. 608.....	181
Wilcox's Case , 5 Ct. Cl. 386.....	99, 174
Wilcox v. Jackson , 13 Pet. 513.....	88
Wilcox v. United States , 56 Ct. Cl. 224.....	121
Willes v. Hoss , 114 Ind. 371.....	50
Willard, Sutherland & Co. v. United States , 262 U. S. 489, 67 L. ed. 1086.....	61
Willard v. Taylor , 8 Wall. 557.....	36
Williams v. Morris , 95 U. S. 444.....	78
Williams Engineering & Construction Co. v. United States , 55 Ct. Cl. 349.....	121
Wilson v. United States , 11 Ct. Cl. 513.....	40
Winfield, Webster & Co. Claim of, Dees. War Dept. Bd. Cont. Adj., Vol. III, p. 10.....	170
Wolsey v. Chapman , 101 U. S. 755.....	88
Wyman v. Wallace , 201 U. S. 230.....	42
Yazoo & Mississippi Valley R. R. Co. v. United States , 54 Ct. Cl. 165.....	121
Young, Frank L. Claim of, Dees. War Dept. Bd. Cont. Adj. Vol. III, p. 495.....	88, 172
Zeigler & Sons Co. Claim of, Dees. War Dept. Bd. Cont. Adj. Vol. VI, p. 742.....	111, 184

TEXTBOOKS CITED.

7 American & English Encyclopedia of Law , 2d ed., 140.....	27
Benjamin on Sales , 6th ed., pp. 166-174.....
Bennett's Am. ed. Benjamin on Sales , p. 314.....	72

	Page
22 Corpus Juris, Evidence, § 1460, p. 1106; § 1512.....	36
1 Greenleaf, Evidence, 16th ed., § 283.....	36
2 Lewis' Sutherland on Statutory Construction, 2d ed., § 379, p. 759.....	53
Mechem on Sales, § 1638.....	159
Mechem on Sales, § 209.....	26
Mechem on Sales, § 754.....	72
24 Ruling Case Law, § 390, p. 121.....	142
Sutherland on Damages, 3rd ed., § 644.....	73
Sutherland on Damages, 4th ed., § 647.....	142
2 Taylor on Evidence, §§ 1132, 1133.....	36
Williston on Contracts, Vol. I, § 28, p. 36.....	27
Williston on Contracts, Vol. I, § 36, p. 54.....	114
Williston on Contracts, Vol. I, § 41.....	25
Williston on Contracts, Vol. III, § 1770, p. 3078.....	78
1 Williston on Sales, 2d ed., § 103, p. 186.....	57
1 Williston on Sales, 2d ed., § 167.....	26
2 Williston on Sales, 2d ed., §§ 449, 450, pp. 1116, 1118.....	24
2 Williston on Sales, 2d ed., § 580, p. 1433.....	144
2 Williston on Sales, 2d ed., § 582, p. 1436.....	144
2 Williston on Sales, 2d ed., § 547, p. 1371.....	157
2 Williston on Sales, 2d ed., §§ 505, 506, pp. 1311, 1312.....	159

STATUTES CITED.

Act of March 2, 1861, 12 Stat. 220.....	96
Act of June 2, 1862, 12 Stat. 411.....	31
Act of July 4, 1864, 13 Stat. 396.....	172
Act of March 3, 1887, 24 Stat. 505.....	80
Act of March 4, 1915, 38 Stat. 1062, 1078.....	32
Act of June 3, 1916, 39 Stat. 166, 213 (National Defense Act, § 120).....	86
Act of August 10, 1917, 40 Stat. 276.....	93, 166
Act of May 20, 1914 (Overman Act).....	166
Act of March 2, 1919, 40 Stat. 1272 (Dent Act).....	105
Revised Statutes, § 3679.....	116
Revised Statutes, § 3709.....	96
Revised Statutes, § 3732.....	117
Revised Statutes, § 3735.....	117
Revised Statutes, § 3744.....	31
Revised Statutes, § 3745.....	128
Statute of Frauds, § 4.....	78
Statute of Frauds, § 17.....	78

MISCELLANEOUS CITATIONS.

	Page
Agricultural Commission to Europe, Report of, Janu. 17, 1919..	162
Annual Report Quartermaster General, 1919, p. 67.....	124
Congressional Globe, 37th Cong., 1st Sess., pp. 226, 370.....	37, 38
Congressional Globe, 37th Cong., 1st Sess., p. 403.....	37
Congressional Globe, 37th Cong., 2nd Sess., p. 3306.....	38
Congressional Globe, 37th Cong., 3rd Sess., p. 199.....	38
Congressional Record, 63rd Cong., 3rd Sess., pp. 2121, 2136....	34
Congressional Record, 63rd Cong., 3rd Sess., p. 4292.....	34
Congressional Record, 63rd Cong., 3rd Sess., pp. 4292, 4392....	34
Dec. Bd. Cont. Adj., Vol. IV, pp. 556, 561.....	97
Dees, Bd. Cont. Adj., Vol. VII, p. 167.....	31, 82, 93, 168
Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, 65th Cong., 3rd Sess., on H. R. 13324, pt. 5, p. 1823.....	95
Hearings before House Sub.-Com. No. 4 of Select Com. on Exp. in War Dept., 66th Cong.....	98
House Report No. 877, 65th Cong., 3rd Sess.....	112
Manual, Q. M. C., Vol. I, pp. 16-17.....	123
Note, 51 L. R. A. (N. S.) 735.....	64, 144
1 Op. A. G., 670.....	58
6 Op. A. G., 583.....	88
7 Op. A. G., 453.....	88
21 Op. A. G., 181.....	102
31 Op. A. G., 349.....	58
32 Op. A. G., 114.....	45, 82
Op. J. A. G., 1917, Vol. 1, pp. 141-142.....	90
Op. J. A. G., 1918, Vol. 2, pp. 934, 935.....	24
Proclamation of President, Nov. 21, 1919, 41 Stat. pt. 2, p. 1774.	165
Uniform Sales Act, § 9.....	144
Uniform Sales Act, § 64 (3).....	144
Uniform Sales Act, § 63 (3).....	144
U. S. Food Alm. Off. Statements, Vol. I, No. 10, Jan. 12, 1919, p. 3.....	162
U. S. Food Adm. Announcement No. 1395, March 5, 1919.....	162

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1925.

No. 288

THE UNITED STATES, APPELLANT,
v.
SWIFT & COMPANY.

No. 289

SWIFT & COMPANY, APPELLANT,
v.
THE UNITED STATES.

ON APPEAL AND CROSS APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR SWIFT & COMPANY.

STATEMENT OF THE CASE.

This is a suit to recover compensation for the loss caused Swift & Company by the refusal of the Depot Quartermaster at Chicago to accept, after it had been produced, a quantity of Army bacon ordered by him for delivery in March, 1919. The only ground for not accepting it was that the need had been removed by the unexpected rapidity of demobilization. The claim was first presented to the War Department under

the Act of March 2, 1919 (40 Stat. 1272); known as the Dent Act. The War Department Board of Contract Adjustment denied relief solely on the ground that the agreement under which the bacon was produced was not concluded until after November 12, 1918.¹ (Dees. War Dept. Bd. Cont. Adj., Vol. IV, pp. 556, 586.) The Secretary of War affirmed that decision. (Dees. App. Sec. War Dept. Cl. Bd., Vol. VII, p. 167.)

The petition in the Court of Claims alleged a cause of action not only under the Dent Act but under the general jurisdiction of the Court as well. The plaintiff obtained a judgment, which the Government is seeking to have reversed and the plaintiff is seeking to have affirmed after first being modified so as to include certain additional items of loss.

A counterclaim asserted by the Government, which the Court of Claims dismissed for want of merit, has now been dropped; as also a motion to remand the case to the Court of Claims for further findings. (Government's Brief, pp. 3, 18.)

Following the declaration of war against Germany, the Secretary of War, on April 12, 1917, issued an order declaring that an emergency existed within the meaning of Revised Statutes, § 3709, and related statutes, providing how supplies for the Government may be procured in times of emergency or public exigency. This order directed that until further notice contracts for such supplies "will be made without resort to advertising for bids." (Finding III, Rec. 26-27.)

On April 24, 1917, Colonel (afterwards Brigadier General) A. D. Kniskern, U. S. A., was made Depot Quartermaster at Chicago (Finding IV, Rec. 27), and as such was the authorized representative of the Acting Quartermaster Gen-

¹ The Dent Act, it will be recalled, applied only to agreements entered into prior to November 12, 1918.

eral in the purchase of meat supplies for the Army. (Finding VII, Rec. 30.) His duty was to supply the needs, and specific authority as to each purchase was not required. (Finding VII, Rec. 30.)

When the Packing-house Products Branch of the Subsistence Division of the Quartermaster General's Office was established at Chicago on July 3, 1918, General Kniskern, as Depot Quartermaster at Chicago, was put in charge of it. (Finding V, Rec. 29.) When supply zones were created on October 28, 1918, he was made Zone Supply Officer for the Chicago district. (Finding VI, Rec. 29.)

By an order dated November 7, 1918, the Subsistence Division, including the Packing-house Products Branch, together with the other divisions of the Quartermaster General's Office, was transferred to the Office of the Director of Purchase & Storage. (Finding IV, Rec. 28.) As the Government's brief states (p. 6), this was only a paper transfer,¹ the same officer being both Director of Purchase & Storage and Acting Quartermaster General, and General Kniskern continuing in charge of the Packing-house Products Branch of the Subsistence Division.

The great packing houses of Swift & Company, Armour & Company, Morris & Company, Cudahy Packing Company, Wilson & Company, Libby, McNeill & Libby, and Jacob Dold Packing Company, referred to in the record as the

¹ In connection with this transfer the Government's brief makes the statement (p. 6) : "Of course, there were corresponding changes down the line from Kniskern as Depot Quartermaster to Zone Supply Officer (R. 29), to Captain Shugert from contracting officer in the Office of the Quartermaster General to the Office of Director of Purchase & Storage (R. 31)." *Captain Shugert was never at any time contracting officer in the Office of the Quartermaster General or the Office of the Director of Purchase & Storage. He was contracting officer only for a division in the Depot Quartermaster's Office at Chicago with minor functions in the local area.* (See post, 129, 130.)

seven large packers, were practically the sole source of meat supplies for the Army of the United States during the World War, and in large part for the armies of our Allies. (Finding IX, Rec. 32.)

They were under the most stringent war-time regulation and control. They could not do business except under license from the Food Administration and upon conditions prescribed by it. The same governmental agency prescribed how their books should be kept and had and exercised unrestricted access thereto for the purposes of audit and control. Their profits were limited to $2\frac{1}{2}$ per cent of their gross sales, *and they kept within that limit.* (Finding XI⁷, Rec. 33-34.)

On November 17, 1917, the Food Administration, finding that the "demand for certain food commodities is greater than the supply," and that "the shortage of supplies and the aggregation of buying in such large units has effectively suspended the law of supply and demand," and that "under these circumstances [purchase] by bid and contract is not only impossible in some cases but in any event raises the general price level * * * and stimulates speculation," proposed that purchases of such commodities for the Army and Navy be made by allocating orders amongst the producers at fair prices based on cost of production. (Finding XIII, Rec. 34.)

About the same time the Government's requirements for Army bacon and canned meats had become so urgent that the Quartermaster's Department of the Army, in conformity with this recommendation of the Food Administration, and under authority of the Secretary of War's order of April 12, 1917, abandoned the competitive method of procurement in the case of those commodities and instituted the plan of placing orders by allocation or allotment amongst the pro-

ducers according to their capacity, at prices based on cost of production. (Findings IX, X, Rec. 31-32.)

Each series of orders so allotted covered the requirements for a stated period—usually three months—and called for deliveries in monthly instalments. (Finding IX, Rec. 32.) The orders had to be placed well in advance of the delivery dates to afford time for manufacture. (Finding IX, Rec. 32.)

It was impossible to tell so far in advance, however, under the conditions prevailing during the War, and particularly with the price of hogs subject to change monthly, what the cost of production would be; so the plan was adopted of leaving the determination of the price open until just before each monthly instalment was delivered. (Finding X, Rec. 32; Finding XXXIII, Rec. 53.)

The procedure adopted by the Depot Quartermaster for arriving at the price was to send out a few days before the first of each month so-called circular proposals¹ to the packing companies amongst which orders had previously been allotted, asking them to propose a price for that month's instalment. (Finding X, Rec. 32.) If the prices submitted were approved by the Depot Quartermaster, or, if not approved, after they had been adjusted to a satisfactory basis in conformity with the standard adopted by the parties, so-

¹The circular proposal is a War Department form the *normal* use of which is to invite bids when contracts are let by competition. Its use was continued under the allotment system of procurement, not, of course, for the purpose of obtaining bids as a basis for awarding orders, but merely as a convenience in arriving at a specific price under orders already placed and in course of fulfillment. (Finding X, Rec. 32.) As will appear further along, refusal to acknowledge this perfectly plain difference, as found by the Court of Claims, between the function performed by circular proposals under the competitive system of procurement on the one hand and under the allotment system of procurement on the other, is the basis of one of the Government's principal contentions in this case.

called formal purchase orders embodying the prices were issued in the name of the Depot Quartermaster. (Finding X, Rec. 32-33.)

Under this practice not only had the order been placed, but the product was far advanced in preparation, at the time the price was fixed for any particular monthly instalment; and the so-called formal purchase orders, as distinguished from the original orders pursuant to which the bacon was produced, frequently were not issued until a part and sometimes all of the product had been delivered. (Finding X, Rec. 32-33.)

At all times, however, there was an agreed standard for determining the price, namely, cost of production plus a reasonable profit within the limits prescribed by the license regulations of the Food Administration. (Finding X, Rec. 32; Finding XXII, Rec. 43.)

In response to the insistent demands of the Army for increased production, Swift & Company engaged J. P. Squire & Company of Boston, Massachusetts, nearly all the stock of which was owned by the Swift family, to manufacture Army bacon for its account. This bacon was marked, "Prepared for Swift & Company," and the War Department knew that it was prepared by Squire & Company. It underwent the same official inspection as the bacon prepared at Swift & Company's own plants. (Finding XXI, Rec. 43.)

Early in 1918 it became apparent that the Government would continue to require for an indefinite time all the Army bacon and canned meats that the seven large packing companies, including Swift & Company, could produce. Whereupon they were requested by the Depot Quartermaster at Chicago to produce those articles to the limit of their capacity, and there was a definite understanding that the Government would take their capacity production until further notice. (Finding XI, Rec. 33.)

In accordance with this agreement the War Department made a survey of the plants of the packing companies to determine how much Army bacon and canned meats they could produce in order that it might know whether they were producing to capacity,¹ and commencing in April, 1918, and continuing throughout the remainder of that year, Swift & Company delivered its capacity production of Army bacon and the War Department received the same and paid for it. (Finding XI, Rec. 33.)

Notwithstanding this agreement for continuous capacity production until further notice, it was still necessary to have some procedure for determining when and in what quantities deliveries should be made, and that was done by continuing to allot orders from time to time as before, calling for deliveries of specific quantities at specific times.

In July, 1918, the Food Purchase Board, a coordinating agency composed of a representative of the Secretary of War, the Secretary of the Navy, the United States Food Administration and the Federal Trade Commission, decided that because of the short supply purchases of bacon and canned meats should be made under the allotment plan. (Finding XIII, Rec. 34; Finding XV, Rec. 35.) As we have seen, the War Department was already doing this, and so far as it was concerned the only changes resulting from the action of the Food Purchase Board, were, *first*, that the Depot Quartermaster at Chicago, while continuing to ascertain the Army's needs from time to time and what part each packing company could deliver, instead of allotting the orders himself, gave the necessary information to the Food Administration, with the request that *it* make allotments accordingly, which it did (Finding XV, Rec. 35-36; Finding XVI,

¹ The capacity of J. P. Squire & Company was included in calculating the capacity of Swift & Company. (Finding XXI, Rec. 43.)

Rec. 37-38); and, *second*, that the Food Administration also became the agency for fixing the price and continued as such until it ceased functioning in December, 1918,¹ the same standard, however, continuing to govern. (Finding XXII, Rec. 43.)

In accordance with the established practice, on November 9, 1918, the Depot Quartermaster called representatives of the seven large packing companies into conference to arrange for the allotment of orders to fill the Army's requirements of bacon and canned meats for the months of January, February and March, 1919. (Finding XVI, Rec. 36.)

In compliance with an express request there made, Swift & Company, on November 12, 1918, submitted an offer in writing to the Depot Quartermaster of the quantities of Army bacon, both serial 10 and serial 8,² that it would be able to deliver during each of the months stated. (Finding XVI, Rec. 36-37.)

In a letter dated November 26, 1918, the Depot Quartermaster requested the Food Administration to allot to Swift & Company for delivery in those months the quantities of serial 10 bacon stated in the Company's offer, namely, 6,000,000 pounds in January, 5,500,000 pounds in February and 6,000,000 pounds in March; and urged that this be done "at the earliest practicable date," so that production could begin promptly. (Finding XVI, Rec. 37-38.)

The allotment was made as requested by the proper officer of the Food Administration in a letter to Swift & Company dated December 3, 1918. (Finding XVI, Rec. 38.) The

¹ The Government's brief states that the Food Administration fixed these prices "on data furnished by the packers." (P. 7.) As stated above, however (p. 4), the Food Administration prescribed how the packers should keep their books and had and exercised unrestricted access thereto for the purposes of audit and control.

² Serial 10 bacon is put up in cans; serial 8, in crates. (Finding XVI, Rec. 40.)

price was left to be determined later in accordance with the practice heretofore described. (Finding XVI, Rec. 38; Finding XXII, Rec. 43.) Two copies of this letter were sent to Swift & Company, on one of which, in accordance with instructions, its acceptance was noted in writing. That copy was returned to the Food Administration. (Finding XVI, Rec. 39.) A third copy was sent to the Packing-house Products Branch of the Subsistence Division, Office of the Director of Purchase & Storage, at Chicago. (Finding XVI, Rec. 39.)

The agreement thus concluded was ratified and confirmed by a letter from the Depot Quartermaster, as Officer in Charge of the Packing-house Products Branch of the Subsistence Division, etc., to Swift & Company, dated December 10, 1918, ordering deliveries of serial 10 bacon in the months of January, February and March, 1919, in accordance with Swift & Company's offer of November 12, 1918. (Finding XVI, Rec. 39.)

At this time, while the Armistice had been signed, peace had not been declared or otherwise consummated. The Army was still in the field and had to be fed. Its food requirements were as great as ever. Nobody then knew that hostilities had ceased for good; nor, when peace was once established, how long it would take to bring home our Armies from across the sea; nor how large an army of occupation would be required.¹ Not until March 20, 1919, did the Secretary of

¹ General March, Chief of Staff of the Army, has testified: "I do not think, under the most favorable conditions of taking the inventories and of stabilizing the demobilization scheme that any legitimate surplus could have been determined in these things [packing-house products among others] before February of this year [1919], because it was the latter part of January or the first of February when General Pershing cabled not to send them forward. Up to that time we continued to send them." (Hearings before Sub-Committee Number 4 of the Select Committee on Expenditures in the War Department, House of Representatives, 66th Congress, Serial 5, p. 94.)

War declare the emergency at an end. (Purchase & Storage Notice No. 105, of March 20, 1919.)

The January and February instalments were duly delivered and accepted. (Finding XXII, Rec. 44.) The Food Administration in the course of winding up its affairs having withdrawn on December 16, 1918, from any further participation in the procurement of supplies for the Army, the price for the January and February instalments was arrived at by the Depot Quartermaster, who used for that purpose the circular proposal in the same manner as before the Food Administration became the agency for fixing the price. (Finding XXII, Rec. 44-45; Finding X, Rec. 32; *ante*, 5.)¹ Subsequently, in March, 1919, formal contracts signed by both parties covering the January and February instalments were executed on a War Department form. (Finding XXII, Rec. 45.) This, however, was merely a paper transaction, since at that time the bacon had not only all been manufactured but delivered and accepted. (Finding XXII, Rec. 44; *post*, 139, 140.)

On January 13, 1919, Swift & Company began putting bacon in cure, under Government inspection, to fill the March instalment. (Finding XVII, Rec. 40; Finding XXIII, Rec. 45.)

On January 24, 1919, the Depot Quartermaster notified Swift & Company to put no more bacon in cure, as the rapidity of demobilization had reduced the Army's needs. (Find-

¹ In its statement of the case (pp. 11-12) the Government refers to these circular proposals as if they were sent out to invite bids as a basis for awarding new orders, omitting all reference to the express finding of the Court of Claims that in this instance and at all other times while the allotment system of procurement was in force circular proposals were used merely as a convenience in arriving at a specific price under orders *long since placed and in process of being filled*. (Finding X, Rec. 32-33; Finding XXII, Rec. 44.)

ing XVIII, Rec. 40-41.) Swift & Company at once complied. (Finding XVIII, Rec. 41.) Since, however, it took about sixty days to prepare Army bacon—the curing alone took from thirty to sixty days (Finding XX, Rec. 43; Finding XXIV, Rec. 46)—large quantities had already been put in cure towards filling the March instalment called for by the contract, and the notice expressly stated that this, if it had passed inspection (as it had), would be accepted. (Par. 2 of Notice,¹ Finding XVIII, Rec. 41.) Accordingly, Swift & Company proceeded with the curing, smoking and canning of what was already in cure, all under Government inspection. (Finding XVIII, Rec. 41; Finding XXIII, Rec. 45.)

On March 5, 1919, the Depot Quartermaster notified Swift & Company to put no more of this bacon *in smoke*, that being the next step after curing. (Finding XIX, Rec. 41.) Swift & Company at once complied. (Finding XIX, Rec. 42.)

This notice like the preceding one expressly stated that what was already in process would be accepted. (Par. 2 of Notice,² Finding XIX, Rec. 42.) Accordingly, Swift & Company completed smoking and canning what was already in smoke, all under Government inspection. (Finding XIX, Rec. 42; Finding XXIII, Rec. 45.) This, when finished, amounted to 4,197,672 pounds, net weight (Finding XXIII, Rec. 45), which was duly and seasonably tendered to the Depot Quartermaster and shipping instructions requested. (Finding XXV, Rec. 46-47.)³

¹"2. Such quantity of bacon as is now in process of cure, over and above the quantity necessary to take care of February awards, and which has been passed by inspectors of this office, will be accepted."

²"2. * * *. Should, however, you have any issue bacon which is now in smoke and which is in excess of the amount required for February delivery, same will be accepted. * * *."

³Swift & Company first notified the Depot Quartermaster that the bacon was ready for delivery in a letter dated March 7, 1919. That

No shipping instructions were ever furnished, but on April 24, 1919, General Kniskern, Depot Quartermaster and Zone Supply Officer at Chicago, wrote Swift & Company that his office was taking preliminary steps toward an adjustment, and requested the Company to be represented at a conference to be held April 29 to consider the procedure to be followed in that connection. (Finding XXVI, Rec. 47.) Following this conference General Kniskern on April 29, 1919, again wrote Swift & Company, transmitting the necessary papers for making out its claim. (Finding XXVI, Rec. 48.)

On August 29, 1919, General Kniskern wrote to Swift & Company stating that until his office received directions from

letter referred to the Depot Quartermaster's letter of March 5 giving notice to put no more bacon in smoke but stating that what was already in process would be accepted. It then stated the quantity ready for delivery, using the language, "We *offer* for delivery during March, etc." Grasping at straws, as it seems to us, the Government in its statement of the case seizes upon the word "offer" and attempts to make out that this was not a tender of delivery under the contract already made, but an *offer to enter into a contract*, and states in italics that "the present controversy arises because of the refusal of the United States to accept said offer" (p. 15). Regardless of the technical accuracy of the language used, all the circumstances show that the letter of March 7 was a tender of delivery of bacon already produced under the Depot Quartermaster's order. Furthermore, law writers themselves use the word "offer" in the sense of tender, as, for example, Mechem on Sales, § 754, where it is said, speaking of an article manufactured to order, that, "title will pass upon a *tender or offer* of delivery even though the buyer refuses to accept it." [Italics ours.]

Similarly, the Government in this same connection seizes upon the sentence in the Depot Quartermaster's response, reading, "as soon as agreement is reached as to prices and purchase orders have been prepared, shipping instructions will be furnished." (P. 15.) As subsequent events show, at that time the Depot Quartermaster was debating whether to accept the March instalment, and the quoted statement was obviously made for the purpose of bridging over the time until a definite decision on that point should be reached. As already seen, frequently a part, and sometimes all, of the bacon had been delivered under the "contracts by letters" before the issuance of the more formal purchase order. (Finding X, Rec. 32-33; *ante*, 5.)

Washington as to the manner of adjusting the claim it would be impossible for him to give "positive and definite" instructions as to the disposition of the bacon which Swift & Company had prepared to fill the March instalment, but advised that it be disposed of as early as possible. (Finding XXVI, Rec. 48.)

On September 15, 1919, the Zone Storage Officer at Chicago, in response to a request from the War Department Board of Contract Adjustment for a verification of the quantity of serial 10 or canned bacon involved in the claim of Swift & Company, reported that there were 58,301 cases—equivalent to 4,197,672 pounds, net weight. (Finding XXVII, Rec. 49.)

In the same month Swift & Company commenced reselling this bacon in the markets of this country and by January, 1920, had resold practically all of it. (Finding XXVIII, Rec. 49.) The net proceeds of the resale were \$1,000,055.81, against a cost of production as found by the Court of \$2,022,-165.40, making a loss of \$1,022,109.59. (Rec. 55.)

This loss was due to two causes: *First*, Army bacon is prepared and packed so differently from commercial bacon and tastes so strongly of smoke and salt that under the best of conditions there is no ready market for it; *second*, the large surplus of Army bacon which the end of the War left on the hands of the Government and the large quantities left on the hands of the other packers was being offered for sale at the same time. (Finding XX, Rec. 42-43; Finding XXVIII, Rec. 49-50.) Swift & Company got as good a price as the Government did; in the nature of things it could not get any higher price than the Government was offering the same product for. (Finding XXVIII, Rec. 49-50.)

Besides the 4,197,672 pounds of smoked and canned bacon, Swift & Company, by stopping smoking as required by the notice of March 5, had left 1,068,539 pounds of bacon not

smoked or canned but only cured—referred to in the record as cured or salt bellies. (Finding XXIII, Rec. 45.) This was bacon which had already been put in cure under Government inspection when the notice of January 24 to stop curing was received. (*Ibid.*)

In compliance with instructions to use every effort to dispose of the material left on its hands by the order to stop smoking,¹ Swift & Company between April and June, 1919—principally in April—shipped 1,003,313 pounds of these cured bellies to Europe and sold them in France, Belgium, Germany and Norway between June, 1919, and January, 1920. (Finding XXX, Rec. 51-52.) It believed that because of the shortage of food products in Europe a good market would be found there. (Finding XXX, Rec. 52.) In the meantime, however, the economic disintegration of Europe had set in, and a loss of \$212,216.69 resulted—the excess of the cost of production over the net amount realized as found by the Court. (Finding XXX, Rec. 51; Finding XXXI, Rec. 53.)² At about the same time Swift & Company made large shipments of its own products to these same markets with a like disastrous result. (Finding XXX, Rec. 52.) The remainder of the cured bellies—65,225 pounds—were sold in the United States at a net loss of \$2,604.54. (Finding XXX, Rec. 51; also Rec. 55, 83.)

Swift & Company also lost \$2,118.05 in the disposition of

¹ The notice of March 5, Par. 5, stated: "In the meantime you are instructed to use every effort to dispose of such material as you now have on hand in order that adjustment may be quickly made." (Finding XIX, Rec. 41-42.)

² The Court found that the cost of production of these bellies was \$37.41 per cwt. (Finding XXXI, Rec. 53), which made the aggregate cost of production of the 1,003,313 pounds amount to \$375,339.39. The Court further found that the amount realized from the resale of these bellies, after proper deductions, was \$163,122.70. (Finding XXX, Rec. 51.) The difference is \$212,216.69.

miscellaneous material left on its hands. (Finding XXXII, Rec. 53.)

DECISION OF THE COURT OF CLAIMS.

The Court of Claims held, *first*, that Swift & Company's offer in writing of November 12, 1918, signed at the end, and the Depot Quartermaster's order in writing of December 10, 1918, accepting the offer, also signed at the end (Finding XVI, Rec. 36, 39), constituted a contract which meets the requirement of Revised Statutes, § 3744, that contracts made by the War, Navy and Interior Departments shall "be reduced to writing and signed by the contracting parties with their names at the end thereof," especially when that section is read in connection with the later act of March 4, 1915 (38 Stat. 1062, 1078), which relates especially to contracts made by officers of the Quartermaster Corps and provides that such contracts "shall be reduced to writing and signed by the contracting parties," omitting the words "with their names at the end thereof;"¹ and, *second*, that in any event performance of the contract by Swift & Company as modified as to quantity by the notices of January 24 and March 5, 1919, takes the case out of the operation of these statutes.

For breach of this contract in refusing to accept the March instalment, the Court gave judgment against the United States for \$1,077,386.30, made up as follows: Loss on the 4,197,672 pounds of smoked and canned bacon, \$1,022,109.59; profit of 2½ percent on the cost of production of these 4,197,672 pounds, \$50,554.12; loss on the

¹The Government states in its brief that the Court came to this conclusion with some doubt. (P. 22.) Indeed, it repeats that statement several times. The point is too small to spend any time upon, further than to express dissent from any such construction of the Court's language.

65,225 pounds of cured or salt bellies sold in this country, \$2,604.54; loss on miscellaneous materials, \$2,118.05.

The Court disallowed the loss on the 1,003,313 pounds of cured or salt bellies sold in Europe, amounting to \$212,216.69, on the ground that while, "in seeking a foreign market * * * plaintiff was acting in perfect good faith and in accordance with its best business judgment, based on former experiences in exporting and information then at hand as to markets to be anticipated abroad," nevertheless, it was its duty to sell the product in this country or show that no better price could have been gotten here. (Op., Rec. 83.)

ASSIGNMENT OF ERRORS.

The judgment is right as far as it goes, but the Court erred in not including in the judgment the loss sustained on the 1,003,313 pounds of cured or salt bellies resold in Europe, amounting to \$212,216.69, as found by the Court. (Finding XXX, Rec. 51; Finding XXX, Rec. 53; *ante*, p. 14, foot note 2.)

THE RESPECTIVE CONTENTIONS.

The Government contends—in each instance contrary to what the Court of Claims found or held—that no contract for the delivery of Army bacon in March, 1919, was ever *in fact* entered into; that if there was such a contract it was unenforceable under the general law for lack of certainty in some of its terms and unenforceable also for failure to comply with the statutes requiring contracts with certain departments of the Government to be reduced to writing; that there was no such performance of the contract as would take it out of the operation of these statutes; that again if there was such a contract it was subsequently abrogated by mutual consent of the parties; that General Kniskern, Depot Quartermaster at Chicago, who entered into the contract on be-

half of the Government, had no authority to do so; and lastly, that Swift & Company did not exercise due diligence in disposing of the bacon left on its hands, and that the proper measure of damages was not applied.

Swift & Company contends that the Court of Claims was right on all of these points, and further, that its conclusions are not reviewable except as to whether the contract was unenforceable for failure to comply with some requirement of the general law or the statutes, all the rest of the questions being either questions of fact or of mixed fact and law.

Swift & Company further contends that an additional and independent ground on which the judgment of the Court of Claims can rest is that the contract is valid and binding under the National Defense Act, § 120 (39 Stat. 166, 213), which provides a short method of placing orders in time of war or when war is imminent, "in addition to the present authorized methods of purchase or procurement," and also under Revised Statutes, § 3709, which provides that in times of public exigency supplies may be purchased by the Government, "in the manner in which such articles are usually bought and sold * * * between individuals;" that still another ground on which the judgment of the Court of Claims can rest is the agreement or understanding reached by the parties early in 1918 for Swift & Company's continuous capacity production of Army bacon until further notice (*ante*, 6), which is enforceable against the United States under the Dent Act; and lastly, that the amount of the loss on the cured or salt bellies—the unfinished product—resold in Europe should be added to the judgment.

POINTS OF ARGUMENT.

- I. The transaction commencing with Swift & Company's offer of November 12, 1918, and concluding with the Depot

Quartermaster's order of December 10, 1918, accepting the offer, constituted a contract good under the general law.

II. A contract resulted from the foregoing offer and acceptance none the less because a so-called purchase order was to be issued later.

III. The statutes requiring contracts made by the Secretary of War or the Quartermaster General or any officer under them to be reduced to writing and signed by the parties were complied with.

IV. In any event the contract was so far executed as not to be within the operation of the statutes requiring contracts made by the Secretary of War or the Quartermaster General or any officer under them to be in writing and signed by the parties.

V. Contracts made in time of war or when war is imminent or to meet an emergency as this one was come within § 120 of the National Defense Act and/or § 3709 of the Revised Statutes, neither of which requires a written contract.

VI. The dealings between the United States and Swift & Company prior to November 12, 1918, constituted an agreement for Swift & Company's capacity production of Army bacon, subject to the right of the United States by due notice to stop production or reduce the quantity, which agreement is enforceable against the United States under the Dent Act.

VII. The finding of the Court of Claims that General Kniskern, Depot Quartermaster and Zone Supply Officer at Chicago, who entered into this contract on behalf of the United States, had full authority to make contracts for meat supplies for the Army, is not reviewable and is right in any event.

VIII. The contention that the contract was abrogated "by mutual consent of the parties in submitting proposals and

bids and entering into formal contracts for January and February deliveries is contrary to the facts as found by the Court of Claims."

IX. The Court of Claims was right in taking as the measure of damages with respect to the 4,197,672 pounds of canned bacon, i. e., the finished product, the difference between the contract price and the net proceeds of the resale.

X. The finding of the Court of Claims that Swift & Company exercised due diligence in reselling the 4,197,672 pounds of canned bacon after the United States refused to take it is not reviewable and is right in any event.

XI. The judgment should be modified by including the amount of the loss sustained by Swift & Company on the 1,003,313 pounds of cured or salt bellies resold in European markets.

THE ARGUMENT.**POINT I.**

The transaction commencing with Swift & Company's offer of November 12, 1918, and concluding with the Depot Quartermaster's order of December 10, 1918, accepting the offer, constituted a contract good under the general law.

By a letter dated November 12, 1918, Swift & Company, at the request of the Depot Quartermaster, submitted an offer of 17,500,000 pounds of serial 10 or canned bacon, 6,000,000 pounds to be delivered in January, 5,500,000 pounds in February, and 6,000,000 pounds in March; also an offer of 4,000,000 pounds of serial 8 bacon (the same as serial 10 except that it is packed in crates instead of tins), 1,400,000 pounds to be delivered in January, 1919, 1,200,000 pounds in February, and 1,400,000 pounds in March.¹ (Finding XVI, Rec. 36.)

By a letter dated November 26, 1918, the Depot Quartermaster requested the Food Administration² to allot to Swift

¹ The offer of serial 8 bacon was not accepted and is not involved in the present case.

² It will be recalled that commencing in August, 1918, orders for bacon and canned meats for the Army and Navy were allotted amongst the producers by the Food Administration under a plan agreed to by the Secretary of War and the Secretary of the Navy and approved by the President. (Finding XIII, Rec. 34; Finding XV, Rec. 36-36; *ante*, 7.)

& Company an order for canned bacon corresponding with its offer of November 12, 1918. (Finding XVI, Rec. 37.)

The allotment was made, as requested, by the proper officer of the Food Administration, in a letter to Swift & Company dated December 3, 1918. (Finding XVI, Rec. 38.) Two copies of this letter were sent to Swift & Company, on one of which it noted its acceptance in writing. (Finding XVI, Rec. 39.) That copy was returned to the Food Administration. (Finding XVI, Rec. 39.)

On December 10, 1918, the Depot Quartermaster also wrote a letter to Swift & Company, referring to the latter's offer of November 12 and ordering deliveries of serial 10 or canned bacon in the months of January, February and March, 1919, in accordance therewith.¹ (Finding XVI, Rec. 39.)

1. Whether these writings be viewed as a whole, or in two groups, one consisting of Swift & Company's offer of November 12 and the Depot Quartermaster's order of December 10 accepting it, and the other consisting of the Food Administration's allotment order of December 3, issued at the Depot Quartermaster's request and bearing Swift & Company's ac-

¹ The Government's brief states that the Depot Quartermaster's letter of December 10 inquired as to the "place of delivery" (p. 25), and that the record is silent as to the response. What he inquired as to was, "where you contemplate putting up these allotments." (Finding XVI, Rec. 39.) He wanted that information "in order that proper arrangements can be made" (*Ibid.*), meaning chiefly no doubt arrangements for inspection. At any rate, that he got the information as to where the bacon was going to be put up is shown by the fact that it was all put up under Government inspection. (Finding XXIII, Rec. 45.)

ceptance,¹ the result is the same—a meeting of the minds of the parties, through an offer by one and an acceptance by the other, on all of the essential elements of a contract of sale for future delivery. There was agreement on the *kind of product*,—canned bacon prepared according to Army specifications; on the *quantity*,—17,500,000 pounds; on the *time of delivery*,—6,000,000 pounds in January, 5,500,000 pounds in February, and 6,000,000 pounds in March.

One of the defenses interposed was “that no contract *in fact* existed;” that these letters were only “preliminary negotiations.” (Government’s Brief, pp. 2, 28.) [Italics ours.]

But that escape is now closed. That in these letters the minds of the parties met with the definite intention of concluding a contract is conclusively established by the findings and judgment of the Court of Claims, since whether they had so met, or whether the negotiations were still in a preliminary stage, was a question of fact. (*City of Chicago v. Greer*, 9 Wall. 726, 735, 19 L. ed. 769, 771;² *American Lumber & Mfg. Co. v. Atlantic Mill & Lumber Co.*, 290 Fed. 630, 634-635, C. C. A. 3rd; *Detroit Copper & Brass Rolling Mills*

¹ While, as previously stated, the Court of Claims held that Swift & Company’s offer of November 12, 1918, and the Depot Quartermaster’s order of December 10, 1918, in accordance therewith, constituted a contract, it also held that the Food Administration’s allotment order of December 3, 1918, had no contractual effect. (Op. Rec. 62-64.) It makes no difference whether that is so or not, since the contract arising from Swift & Company’s offer of November 12 and the Depot Quartermaster’s order of acceptance of December 10 covers the whole ground. We maintain, however, that the Food Administration’s allotment order of December 3, 1918, and Swift & Company’s acceptance of it, *did* constitute a contract. The argument in support of that view is stated in Appendix A. (Post, 164.)

² In this case the Court held: “It was fairly submitted to the jury to find what the contract was and whether it had been concluded.” (9 Wall. 735.) [Italics ours.]

v. *Wise*, 297 Fed. 460, C. C. A. 2nd; *Howell v. Grocers, Inc.*, 2 F. (2d) 499, 501, C. C. A. 6th.)

The acts of the parties themselves show with equal conclusiveness that they treated these letters as constituting a contract, Swift & Company going ahead with production and the War Department going ahead with inspection. (*Post*, 29.)

2. The only question left open, therefore, is whether the contract is unenforceable for failure to comply with some requirement of the general law or of the statute prescribing how contracts made with officers of the Quartermaster Corps shall be entered into.

The Government argues that there was no binding contract because the acceptance was not responsive to the offer, in that whereas Swift & Company's letter of November 12, 1918, made offers of stated quantities of both serial 10 and serial 8 bacon, the Depot Quartermaster's letter of December 10, 1918,¹ accepted only the offer of serial 10. (Government's Brief, pp. 24-25.)

The short answer is: *First*, as the Court of Claims held (Rec. 65), the offer of serial 10 bacon was independent of the offer of serial 8, none the less so because both were contained in the same document, and, therefore, might be accepted independently. *Second*, the regulations of the War Department relating to the submission of offers of subsistence supplies provide that "proposals for the whole or for any part of any item will be considered," and that "in making awards each item is to be considered separately." (Q. M.

¹The Government's brief speaks of this as an acceptance "by inference only." (P. 24.) The Depot Quartermaster's letter refers *expressly*, however, to the offers of serial 10 bacon which had theretofore been submitted by Swift & Company for delivery during the months of January, February and March, 1919. (Finding XVI, Rec. 39.)

C. Form 120, pars. 37, 45.) The offer of November 12 was, therefore, an offer of the whole or any part of the quantities therein stated. That is the only proper construction that can be put upon it anyhow.¹

The Government further contends that this offer and acceptance were ineffective to create a binding contract for lack of certainty, in that no place of performance and no price were specified. (Government's Brief, p. 26.)

It has never been held, however, that an executory contract of sale is void or of no effect because the place of performance is not specified. In such case the law presumes that the parties intend the place of performance to be the seller's place of business or such other place as usage or the course of business between the parties may establish. (2 Williston on Sales, 2d ed., §§ 449, 450, pp. 1116, 1118.)

As regards the price, the Court of Claims found that it was neither practicable nor in the public interest under the conditions existing during the War to fix the price at the time the contract was made. (Finding X, Rec. 32; Finding XXII, Rec. 43; Op., Rec. 74.)² Especially was this true

¹ Indeed, the Government's brief itself states: "The letter, it is true, expresses a willingness that the respective quantities of bacon therein tendered may be varied if necessary." (P. 24.)

² The same practice was followed in making contracts for many other commodities during the War. Indeed, one of the printed forms gotten out by the War Department for orders placed under Section 120 of the National Defense Act provided: "As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination." The Judge Advocate General of the Army in an official opinion has also stated, referring to conditions during the War: "In many cases, as explained in the papers, it is impracticable if not impossible, to fix in advance a reasonable price for the supplies without unduly delaying the service of the order." (Op. Judge Adv. Gen., 1918, Vol. 2, pp. 934, 935.) Likewise, the War Department Board of Contract Adjustment, referring to the practice of deferring the determination of the price under contracts made during the War, said: "This method of price arrangement enabled the Government to

with the contracts being made three months in advance (Finding IX, Rec. 32), and the price of hogs being subject to change *monthly*. (Food Admn. Ann. Rep., 1918, p. 36.)

But even under ordinary conditions an agreement of purchase and sale does not lack validity because no specific price is fixed. In such case the law presumes that a reasonable price was intended. (*United States v. Wilkins*, 6 Wheat. 135, 143;¹ *United States v. Berdan Firearms Mfg. Co.*, 156 U. S. 552, 569; Williston on Contracts, Vol. 1, § 41, and cases cited; Uniform Sales Act, § 9.²)

In the present case, moreover, the parties established a standard for determining the price, namely, cost of production plus a reasonable profit within the limit prescribed by the regulations of the Food Administration (Finding X, Rec. 32; Finding XXII, Rec. 43; Op., Rec. 74); and this was as effectual as if a definite and certain price had been fixed, on the principle that that is certain which can be made certain. (*Joy v. St. Louis*, 138 U. S. 1, 43; *Castle Creek Water Co. v. City of Aspen*, 146 Fed. 8, 13, C. C. A. 8th; *Memphis Fur. Mfg. Co. v. Wemyss Fur. Co.*, 2 F. (2d) 428, 432, C. C. A. 6th; *Valpy v. Gibson*, 4 C. B. 837; 1 Williston on Sales,

secure goods at a more reasonable price; stabilized the market and thus prevented an exorbitant price being paid for the raw materials and at the same time protected the manufacturer." (Case No. 421, *Claim of William Carter Co.*, Decs. War Dept. Bd. Cont. Adj., Vol. V, pp. 203, 213.)

¹ In this case the Court said: "If there be no specific price agreed upon in the contract for rations issued at any place, the contract leaves the price to be adjusted by the Government and the contractor. It is to be the joint act of both parties, and not the exclusive act of either. If they cannot agree, then a reasonable compensation is to be allowed; and that reasonable compensation is to be proved by competent evidence, and settled by a jury, as in common cases; and the defendant upon such a trial, is at liberty to show that the sum allowed him by the Secretary of War is not a reasonable compensation." (P. 143.)

² This provides: "The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be deter-

2d ed., § 167;¹ Mecham on Sales, § 209; Benjamin on Sales, 6th ed., pp. 166-174; Uniform Sales Act, § 9.)

The contention that the contract is unenforceable for failure to comply with the statute requiring contracts with the War Department to be reduced to writing is answered under Points III, IV, V. (*Post*, 31, 59, 86.)

POINT II.

A contract resulted from the foregoing offer and acceptance none the less because a so-called purchase order was to be issued later.

Following the written offer and the Depot Quartermaster's letter accepting it, as each month's instalment of bacon was produced and a specific price therefor arrived at in conformity with the standard theretofore established by the parties, it was the practice, as we have seen, for the War Department to issue a so-called formal purchase order covering that particular month's instalment, "which furnished the basis of payment." (*Ante*, 5; Finding X, Rec. 33.)

Even treating these so-called purchase orders as a more formal expression of the agreement—they were not signed

mined by the course of dealing between the parties. * * * Where the price is not determined in accordance with the foregoing provision the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

¹ This author states the rule as follows: "Ordinarily, the price either in an executed sale or in a contract to sell is fixed by the parties at the time the bargain is made. It need not be stated in words, however. If the parties have by any course of dealing made it possible for a reasonable man in their position to understand their intention as to the price, it will be fixed by this understanding based on previous course of dealing as effectually as if stated in words. Likewise, either in an executory contract to sell, or in a sale, the parties may provide for some means of determining the price later by outside circumstances." (§ 167.)

by both parties but by the Depot Quartermaster only—the rule is that where parties by offer and acceptance have come to an agreement which they contemplate later embodying in a more formal writing a contract arises at once from the offer and acceptance unless a contrary intention is expressed. (*Williston on Contracts*, Vol. I, § 28, p. 36; 7 Am. Eng. Ency. of Law, 2d ed., 140; *Norris v. M. H. Reed & Co.*, 278 Fed. 19, C. C. A. 5th; *Brown v. Jerome*, 298 Fed. 1, 4, C. C. A. 9th; *Sanders v. Pottlitzer Bros.*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431.) As Mr. Justice Holmes has expressed it, the more formal contract in such case, "is merely an additional wheel in the machinery."¹

This rule applies to contracts made with the Government no less than to private contracts. (*Garfield v. United States*, 93 U. S. 242, 23 L. ed. 779; *Harvey v. United States*, 105 U. S. 671, 26 L. ed. 1206; *United States v. Purcell Envelope Co.*, 249 U. S. 313, 63 L. ed. 620; *American Smelting & Refining Co. v. United States*, 259 U. S. 75, 66 L. ed. 833.)

The rule received a particularly pointed application in *Harvey v. United States*, a case involving a contract with the War Department, where it was held that if there was a variance between the terms of the proposal and acceptance on the one hand and the formal written contract on the other, the former would govern, the Court saying:

"The written bid in connection with the advertisement, and the acceptance of that bid, constituted the contract between the parties, so far as regards the question whether the contract prices embraced the cofferdam work. *Garfield v. United States*, 93 U. S. 242; *Insurance Company v. Hearne*, 20 Wall. 494.

¹ "The considerations which we have put forward are not affected by the fact that the contract sued upon contemplated another more formal contract. That is merely an additional wheel in the machinery." (*Drummond v. Crane*, 159 Mass. 577, 579, 38 Amer. St. Rep. 460, 462.)

The written contract, in that respect, was intended by both parties to be, merely, a reduction to form of the statement as to work and prices contained in the bid." (105 U. S. 688.)

In *Purcell Envelope Co. v. United States*, where it was expressly contemplated that the proposal and acceptance would be followed by a more formal writing embodying the agreement, the Government contended that no contract was concluded until the more formal writing was executed. (47 Ct. Cl. 17.) The contention was rejected, this Court saying:

"It makes no difference that the contract was not formally signed or the bond formally approved, as counsel for the Government contends they should have been, both by the terms of the contract and by a statute of the United States (28 Stat. at L. 279, ch. 282, Comp. Stat. 1916, § 3293). Their formal execution, as we have seen, was not essential to the consummation of the contract. That was accomplished, as was decided in the *Garfield Case*, by the acceptance of the bid of the Envelope Company and the entry of the order awarding the contract to it." (249 U. S. 319-320.)

In *American Smelting & Refining Co. v. United States*, the question arose again. The War Department addressed a letter to the claimant placing an order for a certain quantity of copper and stating that a formal contract would go forward in a few days. The claimant sent its acceptance. It was held that the order and acceptance concluded a contract notwithstanding the provision for a more formal written contract, this Court saying:

"* * * Of course, the expressed contemplation of a more formal document did not prevent the letters from having the effect that otherwise they would have had." (259 U. S. 78.)

"* * * We have said nothing about repeated requests that the claimant should sign a formal contract, its refusals, and its ultimate signing under protest, because these facts in no way modify the relation of the parties under the *contract by letters* already made." (259 U. S. 79.) [Italics ours.]

It follows that a contract arose at once from the offer and acceptance in the present case unless it appears that the parties intended that no contract should arise until the issuance of the so-called purchase order. That they had no such intention but that on the contrary their intention was that a contract should arise at once from the offer and acceptance is conclusively established, as already stated, by the findings and judgment of the Court of Claims. (*Ante*, 15.)

But if the question were open the parties' own acts at the time, as set forth in the findings, show that they intended a contract to arise at once from the offer and acceptance without waiting for the more formal purchase order which was expected to follow.

The offer and acceptance covering the January, February and March, 1919, deliveries were part of a series. (Finding IX, Rec. 32.) *Production always commenced at once on the faith of the offer and acceptance, and was far advanced and frequently completed and delivery made before the more formal purchase order was issued.* (Finding X, Rec. 32-33.) Inspection by the War Department went along with production. (Finding XXIII, Rec. 45.) Indeed, as it took about sixty days to prepare Army bacon (*ante*, 11), and as under the practice the more formal purchase order was never issued until just before delivery was due (*ante*, 6), there would have been no bacon to deliver if production had awaited the more formal purchase order. In the specific case of the January and February instalments, the more formal purchase orders were not issued until Jan-

uary 4 and February 4, respectively. (Finding XXII, Rec. 44-45.) These facts alone make it impossible that the parties could have intended that no contract should arise until the execution of the more formal purchase order.

The Depot Quartermaster's letter to the Food Administration dated November 26, 1918, referring to the January, February and March, 1919, requirements, and requesting "that packers be informed at the earliest practical date allotments made to them, in order that they can make necessary arrangements for the procurement of tins, boxes, and other equipment, as well as to know the quantities of green product it will be necessary for them to put in cure during December to apply on later deliveries" (Finding XVI, Rec. 38), shows again that the parties intended a contract to arise at once from the order accepting the offer.

The Depot Quartermaster's letter of January 24, 1919, giving notice to put no more bacon in cure, but stating that, "Such quantity of bacon as is now in process of cure, over and above the quantity necessary to take care of February awards [in other words, bacon in process of cure for March delivery], and which has been passed by inspectors of this office, will be accepted" (Finding XVIII, Rec. 41), was likewise consistent only with the theory that the Depot Quartermaster understood that a contract for the March instalment had been created by the offer and acceptance, as no formal purchase order covering that instalment was ever issued.

The same is true of the Depot Quartermaster's letter of March 5, 1919, giving notice to put no more bacon in smoke, but stating that what had already been put in smoke in excess of the amount required for the February delivery, in other words, what had already been put in smoke for March delivery, would be accepted. (Finding XIX, Rec. 42.)

The Depot Quartermaster's letter of April 24, 1919, informing Swift & Company that his office was "taking pre-

liminary steps towards an adjustment for materials on hand to be applied against March deliveries * * *” (Finding XXVI, Rec. 47), was still another recognition that a contract arose from the offer and acceptance; as was also his letter of April 29, 1919, transmitting to Swift & Company papers “necessary to prepare in order to file a claim for any amount you may consider due from the various packing house commodities allotted you for delivery during March, 1919, and on which you will suffer a loss by reason of cancellation of those orders.” (Finding XXVI, Rec. 48.)

The Secretary of War also found that the parties treated the offer and acceptance as constituting a contract, saying:

“By the custom which had obtained in these dealings these statements from the packers had come to be called ‘tenders,’ which they were in fact, and the acceptance of the tenders in previous cases, followed by allotment orders from the Food Administration, *constituted contracts* which were performed by the packers on the one side and the Government on the other.”¹ (Dees. App. Sec., War Dept., Cl. Bd., Vol. 7, pp. 167, 168.) [Italics ours.]

POINT III.

The statutes requiring contracts made by the Secretary of War or the Quartermaster General or any officer under them to be reduced to writing and signed by the parties were complied with.

Revised Statutes, § 3744, which was taken from Section 1 of the Act of June 2, 1862 (12 Stat. 411), reads as follows:

¹ While thus holding that the offer and acceptance constituted a contract, the Secretary of War as previously stated (*ante*, 2), denied relief under the Dent Act because the particular offer and acceptance covering the March, 1919, delivery, did not take place prior to November 12, 1918.

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return."

The Act of March 4, 1915, reads:

"Hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Quartermaster General, or by officers of the Quartermaster Corps authorized to make them, and are in excess of \$500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Quartermaster General." (38 Stat. 1078; Comp. Stat., 1918, § 6853b.)

It will be observed that the later act relates specially to contracts of the Quartermaster Corps, and that it departs from the earlier general act in two respects:

First. Whereas Revised Statutes, § 3744, requires every contract of the described class "to be reduced to writing and

signed by the contracting parties with their names at the end thereof," the language of the Act of March 4, 1915, is—"reduced to writing and signed by the contracting parties," the words, "with their names at the end thereof," being omitted.

Second. Whereas Revised Statutes, § 3744, requires every contract made by officers of the three departments named to be in writing, the Act of March 4, 1915, requires those contracts only to be in writing which are not to be performed within sixty days and are in excess of five hundred dollars in amount, all others being left to be regulated by the Quartermaster General.

To the extent that it departs from the earlier general act the later special act must, of course, prevail. (*District of Columbia v. Hutton*, 143 U. S. 18, 26, 36 L. ed. 60, 62; *Gibson v. United States*, 194 U. S. 182, 192, 48 L. ed. 926, 931.)

The Government's brief dismisses the Act of March 4, 1915, "as merely a reenactment of the procedure required by Rev. Stats. 3744," and with the further statement that the Court below regarded it as of doubtful application.¹ (P. 29.)

¹ The Government's brief states that, "The Court below regarded the Act of 1915 as of doubtful application to the facts here involved" (p. 29), and quotes in support of that statement the following sentence from the Court's opinion: "If it affects this case, it is only because it lends countenance to a conclusion that §3744 may be complied with without the appending of the signatures of both parties on the same paper at the end thereof." (Rec. 66.) The very next sentence of the opinion reads, however,—"But that has been determined irrespective of this act," showing that all that the Court meant by the sentence which the Government's brief quotes is that it had been determined, without the aid of the Act of 1915, that the law does not require the contract to be embodied in a single paper signed by both parties.

So far from being doubtful as to its applicability, every reference which the Court below made to the Act of 1915 shows that it regarded it not only as applicable but controlling. (Op., Rec. 66, 68, 71.)

It is quite natural that the Government should want to get the Act of 1915 out of the case because the words, "with their names at the end thereof," which that Act dropped from the law so far as contracts with the Quartermaster Corps are concerned, are the mainstay of its contention that a contract in the form of an offer and an acceptance contained in letters does not satisfy the law.

Nor was the dropping of those words any mere chance omission. It was *deliberate*. They were in the bill as it passed the House of Representatives. (Cong. Rec., 63rd Cong., 3rd Sess., pp. 2121, 2136.) In the Senate a formal amendment striking them out was offered by the Committee on Military Affairs which had charge of the bill (Cong. Rec., 63rd Cong., 3rd Sess., p. 4292), and was adopted. (Cong. Rec., 63rd Cong., 3rd Sess., pp. 4292, 4392.)

The contract in the present case, as we have seen (*ante*, 20), was evidenced by two sets of writings: *First*, Swift & Company's offer of November 12, 1918, signed at the end, and the Depot Quartermaster's order of December 10, 1918, accepting the offer, also signed at the end. (Finding XVI, Rec. 36, 39.) *Second*, the Food Administration's allotment order of December 3, 1918, signed at the end by the proper officer of the Food Administration, which Swift & Company accepted by signing at the end an exact copy. (Finding XVI, Rec. 38-39.)

As already seen (*ante*, 21), either of these two groups of writings contains everything that is essential to make the contract legally complete. The parties are named; the kind of product is specified; the quantity is fixed; the time of delivery is fixed. Because the price of hogs was subject to change monthly, and for other reasons growing out of the War (*ante*, 24, 25), the price was left to be determined later. Since, however, a contract may be legally complete though the price be left for future determination (*ante*, 25), so may

the written expression of a contract be complete without any price being specified where that has been left for future determination. (See *post* 57.)

The Court of Claims based its judgment on the first mentioned of these two sets of writings—Swift & Company's offer of November 12, 1918, and the Depot Quartermaster's order of December 10, 1918, accepting the offer.

But whether the contract be regarded as embodied in Swift & Company's offer of November 12 and the Depot Quartermaster's order of December 10 accepting the same, or in the Food Administration's allotment order of December 3 and Swift & Company's written acceptance of that order, or in all of these writings combined, what we have in any case is a written offer signed at the end by one of the parties and a written acceptance signed at the end by the other containing all the essential terms of a contract.

The Court of Claims held that this, without the execution of any more formal document, satisfied Revised Statutes, § 3744, especially when that section is read in connection with the later Act of March 4, 1915, which, as stated, relates specifically to contracts made by officers of the Quartermaster Corps, and, while providing that such contracts "shall be reduced to writing and signed by the contracting parties," omits the requirement that they shall be signed at the end. (Op., Rec. 65-72.)

The contention of the Government on the other hand seems to be that in order for a contract to be reduced to writing and signed by the parties within the meaning of these statutes it must be reduced to a single formal document, i. e., a single document in the physical sense, signed by both parties.

The decision of the Court of Claims accords with both the letter and the purpose of the law, and is supported by the decisions of this Court.

As an offer and an acceptance are what make a contract,

the very letter of the requirement that contracts made by officers of the Quartermaster Corps "shall be reduced to writing and signed by the contracting parties" is met by an offer reduced to writing and signed by one party and an acceptance reduced to writing and signed by the other, all of the essential terms of the agreement being included. And even with the further provision that the contract shall be signed *at the end*, which was dropped by the Act of March 4, 1915, the requirement is met in every substantial way when both offer and acceptance are signed at the end.

The *purpose* of the law is equally fulfilled by this construction. In *Clark v. United States*, 95 U. S. 539, 24 L. ed. 518, where it was held that an *oral* contract was not enforceable against the United States because of Revised Statutes, § 3744, the evil struck at by the statute was thus stated:

"The facility with which the Government may be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by *parol evidence*, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the Government should be in writing." (95 U. S. 541-542.) [Italics ours.]

This mischief is just as effectively guarded against by a signed offer and a signed acceptance in separate writings, including all the essential terms of the agreement, as it is by a single writing signed by both parties, because *parol evidence* to vary the contract is no more admissible in the one case than in the other. (*Bradley v. Washington, etc., Packet Co.*, 13 Pet. 89, 94; *Willard v. Taylor*, 8 Wall. 557, 558-559, 561, 573; *Lawrence v. Morrisania Steamboat Co.*, 12 Fed. 850, 851, opinion by Mr. Justice Blatchford; 1 Greenleaf Evid., 16th ed., § 283; 2 Taylor Evid., §§ 1132, 1133; 22 Corpus Juris Evid., § 1460, p. 1106 and cases cited in

notes 9 and [a] and [b]; § 1512, p. 1132, and cases cited in note 92.)

That it was not the purpose of Congress to require every contract of the War and Navy Departments to be reduced to a single formal instrument signed by both parties, was also made clear in the proceedings attending the passage of the Act.

The bill originated in the Senate. It was reported from the Committee on the Judiciary substantially in the form in which it became a law. (Cong. Globe, 37th Cong., 1st Sess., p. 370.) There was no Committee report, but members of the Committee explained the provisions of the bill on the floor of the Senate. It seems proper to refer to their statements by analogy to the rule permitting reference to committee reports for the purpose of ascertaining the scope of a law when that is in doubt. (See *post*, 112.)

A number of Senators were apprehensive that the bill if enacted would obstruct the operations of the War and Navy Departments, where speed is so often essential. This would have been so, undoubtedly, if the bill *had* required every contract of those departments to be reduced to a single formal instrument signed by both parties, since that takes time, particularly where the parties are in widely separated places. Such a requirement would have prevented altogether the making of a binding contract by telegraphic offer and acceptance, no matter how great the exigency.

These apprehensions were answered by members of the Judiciary Committee in charge of the bill.

Senator Trumbull, Chairman of the Committee, said:

"* * * The chief feature of this bill is, that it subjects these contracts to the examination of the public. Anybody can go and examine them; and it makes a place of deposit for them. * * * *It does not prevent any contract being made by telegraph.*"

(Cong. Globe, 37th Cong., 1st Sess., p. 403.) [Italics ours.]

Senator Cowan, who reported the bill from the Committee (Cong. Globe, 37th Cong., 1st Sess., p. 226), and was its author (Cong. Globe, 37th Cong., 2nd Sess., p. 3306), said:

"If it be true that it is impossible to commit the contracts made by the several departments of this Government to writing, then it is impossible to apply the guards which men in *ordinary every day business* apply to their affairs in order to prevent frauds. * * * *I suppose a business man always requires his subordinates to put their contracts in writing, to bring him all possible evidence of the fairness of the transaction; and that is all this bill requires.*" (Cong. Globe, 37th Cong., 3rd Sess., p. 199.)¹ [Italics ours.]

This shows that a written contract in any form sanctioned by ordinary every day business practice—even in the form of telegrams—was all that Congress intended to require.

As pointed out in the dissenting opinion of Mr. Justice Miller and two other justices in *Clark's Case, supra*, the decision that contracts which do not comply with Revised Statutes, § 3744, are "not enforceable against the United States, must necessarily cause great hardship at times. Certainly that hardship should not be needlessly increased by placing upon the statute a construction which neither its letter nor purpose requires.

At a time when the conditions under which this law was passed and its purpose must have been especially fresh in mind, it seems to have been taken for granted, without any

¹ The discussion of this bill took place principally on a motion to reconsider after it had passed the Senate, and on a motion to postpone until a stated time the taking effect of the law after the bill had passed both Houses. This particular statement was made in the debate on the last mentioned motion.

question being raised, that a contract in the form of an offer and an acceptance contained in letters was sufficient to meet its requirements.

Thus, in *Amoskeag Mfg. Co. v. United States*, 17 Wall. 592, 21 L. ed. 715 (1873), the contract was in the form of a letter from the Chief of Ordnance placing with the claimant an order for all the carbines it could make in six months, not to exceed 6,000, together with the required number of cartridges, both at a specified price; and a letter from the claimant to the Chief of Ordnance accepting the order.¹

¹ As these letters are not incorporated in the opinion of the Court we have copied them from the record, as follows:

"Ordnance Office, War Department,
Washington, D. C., April 13th, 1863.

"Sir: Your letter of the 25th of February, 1863, applying for an order for an additional number of your carbines at twenty dollars each, and offering to furnish cartridges for the same at twenty-two dollars per M., was submitted to the War Department.

"By authority of that Department, I now give you an order for all the carbines that you can make in six months from this date, not to exceed six thousand, to be of the same kind as the five hundred (500) carbines you delivered to Major Hagner and to be accepted and approved by him. For each carbine so delivered and inspected, you will be paid twenty dollars, (\$20.) Two hundred cartridges will be required for each carbine received from you, to be paid for at twenty-two dollars (\$22) per thousand.

"Please signify your acceptance or non-acceptance of this order.

"Respectfully, your obedient servant,

"(Signed) James W. Ripley,
"Brigadier General, Chief of Ordnance.

"Mr. E. Lindner,
426 Eleventh Street, Washington, D. C."

"Washington, April 17, 1863.

"General: I have the honor to acknowledge the receipt of your communication dated the 13th instant, tendering me an order for all the carbines (Lindner carbine) which I can make in six months from the date of your letter, not to exceed six thousand and to be the same as the five hundred delivered to Major Hagner, &c. The Department further desires two hundred cartridges for each carbine, at twenty-two dollars per thousand. This order I have the honor to accept under the conditions above stated and beg leave to express my thanks for the same.

The claimant manufactured and tendered 6,000 carbines within the stipulated time, but the Government refused for no sufficient reason to receive or pay for them. Judgment was given for the damages thereby caused the claimant. This is the exact counterpart of the present case.¹

That the point in question was not *expressly* passed upon in this case does not impair its force as a precedent. The point was *necessarily* involved, since there could have been no recovery if the statute be not satisfied by a contract in the form of an offer and acceptance contained in letters. That is enough.

A similar situation was presented in *Billings v. United States*, 232 U. S. 261, 58 L. ed. 596. One of the points there was whether interest is recoverable by the Government on delinquent taxes without a statute to that effect. The Government relied upon several prior cases in this Court where recovery of such interest had been allowed. In those cases, however, the question of interest was not expressly passed upon or even discussed, and the other side contended that,

"Trusting the Department will increase this order, I have the honor, general, to be, with high regard, your obedient servant.

"(Signed) Edward Lindner,
"426 Eleventh Street.

"Brigadier General James E. Ripley,
Chief of Ordnance."

(Copied from Transcript of Records, Supreme Court United States, 1873, Vol. 4, Case No. 95.)

¹ See also *Baird v. United States*, 131 U. S. CVI (Appendix), 21 L. ed. 519 (1872), affirming 5 Ct. Cl. 348; *United States v. Bostwick*, 94 U. S. 53, 65, 66, 68; 24 L. ed. 65 (1877); *Brandeis v. United States*, 3 Ct. Cl. 99, 100, judgment for claimant (1867); *Lee v. United States*, 4 Ct. Cl. 156, 157, 158, 163, judgment for claimant (1868); *Wilson v. United States*, 11 Ct. Cl. 513, 514, contract recognized but case dismissed because alleged breach was act committed by United States in its sovereign capacity (1875); *Ruffee v. United States*, 15 Ct. Cl. 291, 292, judgment for claimant (1879); *McLean v. United States*, 17 Ct. Cl. 83, 84, petition dismissed on other grounds (1881).

therefore, they were not entitled to any weight as authority upon that point.¹ This Court nevertheless held them to be controlling.²

A very recent case in this Court where authority was similarly accorded to a prior case in which the point in question, while necessarily involved, was not expressly passed upon, is *Sowell v. Federal Reserve Bank of Dallas*, decided May 25, 1925.³

The truth is that absence of any discussion in the *Amoskeag Mfg. Co. Case* of the question whether "a contract by letters" satisfies the statute, when that question was necessarily involved, and especially when at the time that case was

¹ "In some of these cases, there was no assignment of error which presented the point; in others the amount of the interest was too trifling to invite controversy; in none of them was there any consideration of the subject, either by the court or counsel, and in none was the court required to decide the point. The whole matter merely passed *sub silentio*. It is familiar law that cases in which a particular point is so passed are entitled to no weight whatever as authority upon that point." (From brief of counsel, 58 L. ed. 600.)

² The opinion of Mr. Chief Justice White states: " * * * On the other hand, the Government relies upon four cases in this Court where interest was allowed as a matter of course on taxes due the United States. * * * We say, as a matter of course, because in the cases referred to, the subject was not discussed and the liability for interest was practically admitted." (Pp. 284-285.)

* * * * * From this it follows that although in the cases in this Court to which we at the outset made reference which enforced the liability for interest, and *which are here controlling if they be not now overruled*, there was no controversy as to the liability for interest, this was presumably because the matter was deemed not disputable as the direct result of the then-settled doctrine that interest could be recovered by the United States on a default in payment of import duties. Under this condition we can see no ground for departing from the rule which the cases enforced, * * *. (P. 288.) [Italics ours.]

³ The question there was whether the so-called 'assignee clause' of the Judiciary Act of 1789 withholding from the Federal Courts

under consideration § 3744 was being constantly invoked¹ (having been held mandatory in *Clark v. United States*, 95 U. S. 539, but a short time before, as judicial history goes), indicates only the more clearly that it was the accepted view that a contract in that form *does* satisfy the statute.

Coming down to the present day, in *American Smelting & Refining Co. v. United States*, 259 U. S. 75, 66 L. ed. 833, the agreement was in the form of a letter from the Ordnance Department dated March 28, 1918, offering to buy from the claimant 30,000 tons of copper at a specified price, and a letter from the claimant dated April 11, 1918, accepting the offer. (259 U. S. 77.) A more formal written contract was contemplated but was not executed at the time. (259 U. S.

jurisdiction of suits on assigned choses in action unless they would have had jurisdiction had there been no assignment is applicable to suits based on the Act of 1875 extending the jurisdiction of the Federal Courts to all cases arising under the laws of the United States, or whether it is only applicable where the sole ground of jurisdiction is diversity of citizenship. The question had never been expressly passed upon, but in *Wyman v. Wallace*, 201 U. S. 230, the exercise of jurisdiction could have been sustained only on the theory that the "assignee clause" is not applicable to suits arising under the laws of the United States. The Court cited and followed that case, saying through Mr. Justice Stone: "The precise question seems not to have been *expressly* passed upon by this court since the Act of 1875. It, however, was *necessarily involved* in *Wyman v. Wallace*, 201 U. S. 230, in which the assignee clause would have defeated the jurisdiction attaching because of diversity of citizenship, but in which the jurisdiction was, nevertheless, upheld because the case was one arising under a law of the United States." [Italics ours.]

¹ For example see *Adams v. United States*, 7 Ct. Cl. 437 (1871), and *Salomon v. United States*, 7 Ct. Cl. 482 (1871), in the former of which it was said: "The contract under which the 18,000 bushels were shipped * * * was a parol contract * * * entered into without previous advertisement * * * and was not reduced to writing and signed by the parties as the law requires. Such a contract is void as has been *repeatedly* held by this Court." (Pp. 440-441.) [Italics ours.]

77.) Subsequently the War Industries Board fixed a higher price for copper, effective July 2, 1918. The claimant then refused to sign the formal contract at the lower price, but finally did so under protest, apparently after the copper had all been delivered. The claimant sought to cast aside the price specified in the Ordnance Department's offer of March 28, and to recover the higher price for all copper delivered after July 2, 1918, when the higher price went into effect. It advanced two grounds of recovery: *First*, that the letter of the Ordnance Department was a compulsory order under section 120 of the National Defense Act providing for fair and just compensation, and that with respect to all copper delivered after July 2, 1918, the higher price fixed by the War Industries Board was fair and just compensation. *Second*, that it was entitled to an *adjustment* of its agreement on a fair and equitable basis under the Dent Act (the Act of March 2, 1918), authorizing the Secretary of War "to *adjust*, pay, or discharge any agreement express or implied, upon a fair and equitable basis, that has been entered into, in good faith during the present emergency and prior to November 12, 1918, by any officer or agent acting under his authority * * * or that of the President * * * when such agreement has been performed in whole or in part * * *, and * * * *has not been executed in the manner prescribed by law* * * *." [Italics ours.]

This Court held "that the claimant must stand upon the letters of March 28 and April 11" (259 U. S. 79), and accordingly dismissed the first ground. It ignored completely as of no effect the more formal written contract, and accepted the letters of March 28 and April 11 as constituting the contract of the parties, saying:

"* * * We have said nothing about repeated requests that the claimant should sign a formal contract, its refusals, and its ultimate signing under pro-

test, because these facts *in no way modify the relation of the parties under the contract by letters already made.*" (259 U. S. 79.) [Italics ours.]

If it be said that by this the Court may not have meant that a "contract by letters" is legally sufficient when the United States is a party but only that the claimant in any event is bound, the answer is that any doubt in that regard seems to be removed by what the Court said in denying the petition for relief under the Dent Act—

"* * * Our judgment excludes any remedy under the Act of March 2, 1919, c. 94, 40 Stat. 1272, providing for supplies and services furnished under agreements *not executed in the manner prescribed by law.*" (259 U. S. 79.) [Italics ours.]

This can only mean that the Court considered that the contract effected by the letters of March 28 and April 11 was executed in the manner prescribed by law and for that reason was outside the Act of March 2, 1919. There was no other reason that we can see for saying, "Our judgment excludes any remedy under the Act of March 2, 1919." All the other elements necessary to bring the agreement within the jurisdiction conferred by that Act were present. It was entered into during the War emergency and prior to November 12, 1918, by an officer acting under the authority of the Secretary of War; it was for supplies for the War Department; it was not only partly but wholly performed prior to November 12, 1918. It cannot be said that the Court did not have in mind Revised Statutes, § 3744, because the briefs of both sides were full of mention of it.

In *United States v. Cornell Steamboat Co.*, decided by this Court March 2, 1925, the contract was also in the form of letters. During 1917 and 1918 the United States, acting through an officer of the War Department, hired twelve tugs

from the claimant under what the Court's opinion describes as "informal charters evidenced by letters."¹ Formal charter contracts were contemplated but not executed. The rate of hire was so much "for each and every day of the charter period," and the owner agreed "to furnish everything for these tugs with the exception of coal and water." Before paying the bills, which were submitted monthly, the Government made certain deductions for the time it had been deprived of the use of the tugs, due partly to some of them reporting at times with short crews or otherwise not in condition to perform the service required, but principally to the fact that one of them sank and was entirely out of commission during a substantial part of the charter period. It was held that under the contract these losses fell upon the Government.

This judgment was based *on the contract itself* and not on a *quantum meruit* for the value of the use of the tugs. This is made plain by the opinion, and from the very nature of the case it must be so, since had the action been on a *quantum meruit* for the value of the use of the tugs nothing, of course, could have been recovered from the Government for the time that it did not have the use of them.

The Attorney General also, contrary to the position he is taking here, has held that an offer in writing signed by one party and an acceptance in writing signed by the other constitute compliance with § 3744, notwithstanding that a more formal written contract was contemplated and in fact executed. (32 Op. A. G. 114, 121.) In that case the War Department gave an order to the Caleo Chemical Company dated November 17, 1917, for the manufacture of a quantity of TNA. The company noted its acceptance at the

¹These letters are set out in the findings of the Court of Claims.
(58 Ct. Cl. 497-509.)

bottom of the order, which recited that when accepted a contract would be prepared. The order was complied with until December, 1918, when the company suspended operations on request of the United States. In January, 1919, a formal written contract covering the order was executed as originally contemplated. While much more complete and containing many details not in the order, it made no important change. The Secretary of War asked the Attorney General for an official opinion on the legal effect of these proceedings. He held that the order and its acceptance constituted a contract which met the requirements of § 3744 (p. 121), and that the more formal written contract subsequently executed was no more than a ratification. (P. 123.)

The conclusion that Swift & Company's letter of November 12, 1918, offering Army bacon for delivery in specified instalments in the months of January, February and March, 1919, and the Depot Quartermaster's letter of December 10, 1918, accepting the offer, satisfied the statute requiring contracts made by officers of the Quartermaster Corps to be "reduced to writing and signed by the contracting parties," is further confirmed by decisions of this Court construing similar language in other statutes.

In *Brown v. District of Columbia*, 127 U. S. 579, 32 L. ed. 262, the statute involved was Section 37 of an Act of Congress of February 21, 1871 (16 Stat. 419, 427), providing that "all contracts made by the said Board of Public Works [of the District of Columbia] shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the Secretary of the District." [Italics ours.] The claimant submitted to the Board of Public Works a proposal in writing to do certain work. The proposal was accepted in writing by the Assistant Secretary of the Board. While the Court found as a matter of fact that the Assistant Secretary accepted the proposal without

authority from the Board and that therefore no binding contract resulted, it clearly indicated that if the Assistant Secretary had been authorized to accept the proposal, the written proposal and the written acceptance would have satisfied the statute. On that subject it said:

"The appellant contends that the alleged contract sued upon meets the requirements of § 37, of the Act of February 21, 1871, which provides that 'all contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District;' and that the contract sued upon being a formal proposition in writing, and an acceptance thereof in writing, signed by the secretary of the board, whose authority to sign the same is not denied, and whose genuine signature thereto is admitted, was a valid contract binding upon the parties.

"Numerous authorities are cited to show that the written acceptance by one party of a written proposal made to him by another party creates a contract of the same force and effect as if formal articles of agreement had been written out and signed by said parties. *The legal principle asserted is sound*, but the fallacy of the argument lies in the assumption that the proposition of the pavement company was in fact submitted to the board, and that the latter did in fact authorize the letter to be written by Secretary Johnson accepting the said proposition." (P. 583.) [Italics ours.]

This case forces from the Government the admission that if the Act of March 4, 1915, and Revised Statutes, § 3744, instead of providing that contracts of the described class shall be *reduced to writing* and signed by the contracting parties, had provided that such contracts shall be *in writing* and signed by the contracting parties, a *formal* writing would not be necessary, but that "*any* written contract

as used in the ordinary terms of the law" would be sufficient. (Government's Brief, pp. 29, 42.)

To rely upon such a distinction seems to us to surrender the point. In the very passage which the Government's brief (p. 39) quotes from the opinion of this Court in *Clark v. United States*, 95 U. S. 539, 541, the expressions "in writing" and "reduced to writing" are used interchangeably in discussing the requirements of Revised Statutes, § 3744.

In *Bayne v. Wiggins*, 139 U. S. 210, 35 L. ed. 144, the following provision of the Pennsylvania Statute of Frauds, which is a copy of the first section of the English statute, was involved:

"All leases, estates, interests of freehold or term of years, or any uncertain interest of, in or out of any * * * lands * * *, made or created by livery and seisin only, or by parol, *and not put in writing and signed by the parties so making or creating the same*, or their agents thereunto lawfully authorized by writing, shall have the force or effect of leases or estates at will only, and shall not * * * have any other or greater force or effect, * * *."

[Italics ours.]

The question was whether a contract contained in letters was sufficient under this statute. The original memorandum of sale was admittedly insufficient because it did not describe or identify the land. The plaintiffs, however, executed a deed which *did* describe the land, and forwarded it to the defendants with a letter setting forth the terms of sale as previously agreed upon. This deed was ineffective as a conveyance because not properly acknowledged. The defendants thereupon wrote a letter to the plaintiffs enclosing a new deed with a proper certificate of acknowledgment, and stating that upon the execution and return of the same the terms of sale would be complied with. The new deed was executed

and tendered, but the defendants then refused to go on with the sale. This Court, assuming the Pennsylvania statute required such an agreement to be in writing and signed by both parties (139 U. S. 215), held that the plaintiffs' letter to defendants, incorporating the terms of sale and enclosing a deed which, though ineffective as a conveyance, sufficiently described the property, and the defendants' letter in response thereto, satisfied the statute (139 U. S. 215); in other words, that a contract in the form of a letter submitting an offer and a letter accepting the offer, both duly signed, is a contract in writing signed by the parties.

Also in point are the decisions of this Court holding that an offer in one paper and an acceptance in another, signed by the parties respectively to be charged, satisfy the fourth and seventeenth sections of the Statute of Frauds. True, those sections provide that the contract, *or some note or memorandum thereof*, shall be in writing, whereas Revised Statutes, § 3744, and the Act of March 4, 1915, provide that the *contract* shall be in writing. There is a close analogy, nevertheless, since the "note or memorandum" must state all the essential terms of the agreement. A representative case of this class is *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, where it is stated:

"The principle is well established that *a complete contract* binding under the Statute of Frauds may be gathered from letters, writings and telegrams, between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute *one paper* relating to the contract." (149 U. S. 496.) [Italics ours.]

So here, Swift & Company's offer of November 12, 1918, the Food Administration's allotment order of December 3,

1918, and the Depot Quartermaster's confirmatory order of December 10, 1918, signed by the respective parties and containing all the essential terms of the agreement, constitute in a legal sense "one paper"—"a complete contract binding under the Statute of Frauds," and by analogy binding under Revised Statutes, § 3744, since that "was intended to operate as such," i. e., as a statute of frauds (*Clark v. United States*, 95 U. S. 539, 542; *United States v. New York & Porto Rico S. S. Co.*, 239 U. S. 88, 92), and is "subject to the same reasons and rules of construction." (*Jones v. United States*, 11 Ct. Cl. 733, 740.)

Also, since all that the law was intended to require is a written contract in any form sanctioned by ordinary every day business practice (*ante*, 37, 38), the cases in this Court holding that a contract in the form of correspondence or letters signed by the respective parties is a contract in writing for the purposes of the parol evidence rule are applicable. The case of *Bradley v. Washington, etc., Packet Co.*, 13 Pet. 89, 94-95, 97, is an example.

Cited below are a few decisions by other courts holding generally that statutes requiring contracts to be in writing are satisfied by an offer in one paper and an acceptance in another, both duly signed.¹

The Government cites no case in this or any other court holding that the Act of March 4, 1915, requiring contracts made by officers of the Quartermaster Corps to be "reduced to writing and signed by the contracting parties," is not satisfied by an offer in one writing and an acceptance in another, both duly signed.

¹ *City of California v. Bunceton Telephone Co.*, 112 Mo. App. 722, 87 S. W. 604, 605; *Wiles v. Hoss*, 114 Ind. 371, 379; *Central Georgia Power Co. v. Butts County*, 139 Ga. 490; *Argus Co. v. City of Albany*, 7 Lans. 264, 268, 269, Aff. 55 N. Y. 495; *Halstead v. The Minnesota Tribune Co.*, 174 Minn. 294, 299; *Pontifex v. Farham*, 62 L. J. Rep. (Q. B. 1892) 345, 346.

And even with respect to Revised Statutes, § 3744, requiring in addition that the signatures shall be at the end—now displaced so far as contracts made by officers of the Quartermaster Corps are concerned by the Act of March 4, 1915 (*ante*, 33)—the Government is no better off when it comes to finding support in the decisions of this Court for the contention that to satisfy the statute the contract must be embodied in a single formal instrument, and that an offer in one writing and an acceptance in another, both duly signed at the end, are not sufficient.

It cites *South Boston Iron Company v. United States*, 118 U. S. 37. But, as the opinion below points out (Rec. 67-69), the real ground of decision in that case was that there was no agreement at all because the minds of the parties had never met on an essential point—an altogether different proposition. The Government's brief itself states that in that case "the Court did not expressly hold that the contract must be an entire one and signed at the end by both the parties;" that "such a decision was not necessary under the facts of the case." (P. 40.) The claimant in that case wrote a letter to the Navy Department offering to build new boilers for certain ships according to specifications to be furnished. He received a reply accepting his offer, but—"The drawings and specifications which were to become a very important part of the contract were not in writing at the time nor even considered and determined upon." (18 Ct. Cl. 178.) Thus a part of the contract so essential that performance could not even start without it was left wholly undetermined by the letters containing the offer and acceptance. Of course, therefore, there was not only no writing sufficient to meet the requirements of the statute, but no contract at all,—"Nothing more," as this Court said, "than preliminary memoranda." (118 U. S. 42.) Furthermore, unlike the present case, the parties themselves in that case did not treat the exchange of

letters as constituting a contract. On the contrary, as this Court took pains to say, the claimant "neither performed any of the work * * * nor has it ever been called on to do so." (118 U. S. 42.)

It is true that the *Court of Claims* in its opinion in that case made the statement that to satisfy Revised Statutes, § 3744, the contract must be embodied in a single formal instrument. (18 Ct. Cl. 176-177.) It based this construction on the provision requiring the parties to sign the contract "with their names at the end thereof." (18 Ct. Cl. 176-177.)¹ Indeed, wherever that contention has been advanced, including the present case, it has been based on the presence of these words in the statute.²

Even had this been a correct construction of the law as it then stood—we have shown the contrary (*ante*, 35-50)—the ground on which it was based was swept completely away, so far as contracts made by officers of the Quartermaster Corps are concerned, by the Act of March 4, 1915. That act, as

¹ Thus, after commenting on the fact that the quoted words are not found in the Statute of Frauds, the opinion continues:

"It is plain that some additional requirement is involved in the words 'with their names at the end thereof.' They are not repugnant to any other part of the act. They cannot be meaningless. The same idea has been discussed in legislative bodies, and one State at least has required certain contracts 'to be signed at the foot.' Congress inserted these words for a purpose, and courts must give them effect. We cannot shave off the language of an act of Congress to bring its meaning within less restricted language, common in statutes of fraud. These additional words cannot mean less than that the contract shall be so full and complete before signing that it can be signed in whole by both parties. It excludes the idea that one party may sign one part of the contract and the other party another and leave the courts to arrange a contract by collecting and joining the pieces. That can be done, as has been often held, under the English statute, but 'not under ours, unless we entirely erase the words 'with their names at the end thereof.'" (18 Ct. Cl. 176-177.)

² The Government's brief in the present case emphasizes them over and over again.

heretofore pointed out, while reenacting with certain exceptions the requirement of § 3744 that such contracts "shall be reduced to writing and signed by the contracting parties," omitted the provision requiring the parties to sign "with their names at the end thereof." Therefore, assuming, but not conceding, that Congress intended these words of § 3744 to have the effect ascribed to them by the Court of Claims in the *South Boston Iron Company Case*, their omission from the later act would imply, under a well settled principle of statutory construction, a change of intention in that regard on the part of Congress. "When the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose." (*Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 447-448, 45 L. ed. 1171, 1177¹; see also *Stewart v. Kahn*, 11 Wall. 493, 502, 20 L. ed. 176, 177-178; 2 Lewis' *Sutherland on Statutory Construction*, 2d ed., § 379, p. 759.)

¹ In this case the principle was stated and applied as follows:

"Section 5084, Rev. Stat., provided that 'any person who * * * has accepted any preference *having reasonable cause to believe that the same was made or given by the debtor* contrary to any provisions of the act of March 2, 1869, chap. 176, * * * shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference.'

"The words in italics are omitted from the act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. Was it left out in words to be put back by construction? Taken from the certainty given by prior use and prior decisions, and committed to doubt and controversy. There is a presumption against it. *When the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose.* This rule was lately applied in *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000. In that case, in determining whether the jurisdiction of the circuit and district courts of the United States was concurrent with the state courts in certain suits at law and equity between the assignee in bankruptcy and the adverse claimant of property of the bankrupt, the statutes of 1841 and 1867 were compared with that of 1898, and from the omission from the

This implication becomes conclusive, where, as here, all possibility of the omission having been inadvertent is excluded by the fact that the words were deliberately struck out by amendment in the course of the passage of the bill. (*Ante*, 34.)

The fact is that so far from being any help to the Government's case here, the opinion of the Court of Claims in the *South Boston Iron Company Case* expressly recognizes that with the words, "with their names at the end thereof," elided, as they have been so far as contracts made by officers of the Quartermaster Corps are concerned, the law is satisfied by an offer in one writing and an acceptance in another, both duly signed. (18 Ct. Cl. 176-177.)

The Government's brief also cites *United States v. New York & Porto Rico Steamship Co.*, 239 U. S. 88. It is true that the contract there was in the form of letters but the Court had no occasion to consider and did not consider whether a contract in that form satisfies the statute, for the simple reason that that was a suit *brought by the Government* and the defense that a contract does not comply with the statute is not available against the Government. That was the sole ground of the decision.

While the Court in that case had no occasion to consider whether a contract in the form of letters satisfies the statute, the Government did give consideration to that question, and as its second point (its first point being the one previously mentioned on which the case was decided), took a

latter of certain provisions of the former statutes it was decided that such jurisdiction did not exist. It was said by the court, speaking by Mr. Justice Gray: 'We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of § 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts.' (182 U. S. 447-448, 45 L. ed. 1177.) [Italics ours.]

position directly contrary to that which it is taking now. Thus the brief of the Solicitor General, who argued the case, states:

"The signed offer and acceptance in writing constitute compliance with the statute." (P. 25.)

* * * * *

"Defendant's offer of transportation by letter of November 13, 1909, and plaintiff's acceptance by telegram of the same date, constitute the common law contract and both are in writing and signed by the parties." (P. 25.)

* * * * *

"True, both parties would not have signed one page of paper. But each party has signed at the end of his own written undertaking, i. e., his contract." (P. 25.)

* * * * *

"To require one precise form of bilateral agreement, to be in one written instrument which both parties must sign, would prohibit the quick consummation of contracts by telegram by the War and Navy Departments, at times when haste often would be most necessary. Such a result is not lightly to be reached." (P. 26.)¹

This was said with reference to Revised Statutes, § 3744. It applies with even greater force to the Act of March 4, 1915, which drops the words, "with their names at the end thereof."

The last case cited by the Government is *Erie Coal & Coke*

¹ As already seen, this very question was raised when the law was on its passage, and it was made plain by members of the Judiciary Committee of the Senate, who had charge of the bill, that a written contract in any form sanctioned by ordinary everyday business practice—even in the form of telegrams—was all that would be required. (*Ante*, .)

Corp. v. United States, 266 U. S. 518. In that case there was nothing but a bid made at auction. Moreover, the advertisement of the auction expressly stipulated "that acceptance of any bid would not be final until the execution of a contract and bond * * *." There is not a word or suggestion in the opinion of the Court to the effect that an offer in writing signed at the end by one party and an acceptance in writing signed at the end by the other do not meet the requirements of Revised Statutes, § 3744. Nor did the Court even have before it the Act of March 4, 1915. Finally, whatever agreement there was, was wholly executory.

The remaining cases cited by the Government on this point are *Clark v. United States*, 95 U. S. 539; *Brown v. District of Columbia*, 127 U. S. 579; *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159; *United States v. Andrews & Co.*, 207 U. S. 229; and *American Smelting & Refining Co. v. United States*, 259 U. S. 75. Of these, the *Clark Case* and the *St. Louis Hay & Grain Company Case* were cases of oral contracts, and, therefore, do not touch the point, as the Government's brief itself notes. (Pp. 39, 43.) The others, we think, not only lend no countenance to the Government's contention, but strongly support our side of the issue, and are discussed in that connection. (*Ante*, 42, 46; *post*, 59.)

The Government's brief suggests that the subsequently executed formal contracts, signed by both parties, covering the January and February instalments, show that there was "substantial doubt" in the minds of the parties as to whether the contract by letters previously entered into met the requirements of the statute. (Pp. 37, 76.)

The short answer is that what the parties thought the law was is not of great importance. But no such inference as the Government suggests is justified even as to what the officers of the Government thought, much less as to what the officers of Swift & Company thought. Men frequently exe-

cute documents over again, not because of any real doubt as to their legal adequacy, but out of abundance of caution.

But not even that limited inference can be drawn here because these subsequently executed formal contracts were mere paper transactions on their face. At the time of their execution the product had not only been completely manufactured but most of it had been delivered. (*Post*, 139, 140.)

The Government's brief also suggests that Swift & Company's letter submitting the offer and the Depot Quartermaster's letter accepting it cannot be held to satisfy the statute because no price was specified. (P. 38.)

We have shown that the price was left undetermined until a later date for reasons of necessity growing out of the War, and that the same practice was followed at that time by the Government with respect to contracts for various other commodities. (*Ante*, 24, 25.)

The complete answer is, as already stated, that since a contract may be legally complete though the price be left for future determination (*ante*, 25), the law implying in such case a reasonable price, so may the written expression of a contract be complete without any price being specified where the parties have left that for future determination.

A similar question early arose under the statutes of frauds, to which classification Revised Statutes, § 3744, belongs (*Clark v. United States*, 95 U. S. 539, 542; *United States v. N. Y. & Porto Rico S. S. Co.*, 239 U. S. 88, 92), and it was decided that a memorandum otherwise complete, but which stated no price, satisfied the statute where no price in fact had been agreed upon.¹

¹ Williston on Sales, 2d ed. §103, p. 186: "If the agreement in fact did not include a fixed price none need be mentioned in the memorandum; the law will imply an obligation to pay a reasonable price and the memorandum need be no more definite than the contract itself was. The law will make the same implication in regard to the memorandum that it does in regard to the promise." (Citing cases.)

Also compare the cases holding that the time of performance of a contract within the operation of Revised Statutes, § 3744, may be extended by an oral agreement. (*Salomon v. United States*, 19 Wall. 17, 19, 20, 22 L. ed. 46, 47; *District of Columbia v. Camden Iron Works*, 181 U. S. 453; 45 L. ed. 948; *Maryland Steel Co. v. United States*, 235 U. S. 451, 460, 59 L. ed. 312, 316.)

Indeed, if a contract could not be reduced to writing within the meaning of the statute without naming a specific price, the Government would be debarred from entering into contracts of a kind which, as the experience of the recent War shows (*ante*, 24), the necessities of the case often require.

The Government's brief also, in several places, refers to the signing of the letter of December 10, 1918, by "A. D. Kniskern, Brigadier General, Q. M. Corps, Officer in Charge, by O. W. Menge, 2nd Lieut. Q. M. C.," in a way to imply that that was not a sufficient signature under the statute.

It cites (p. 72) a decision of the Comptroller of the Treasury to the effect "that proxy signed contracts" are invalid, apparently overlooking that the opinions of the Attorney General are to the contrary (1 Op. A. G. 670; 31 Op. A. G. 349), and that in the recent case of *Union Twist Drill Co. v. United States*, 59 Ct. Cl. 909, it was expressly decided that "the affixing of the signature of the contracting officer by another, duly authorized, creates no infirmity in the execution of the contract" (p. 914), and the Attorney General took no appeal. It is, of course, elementary that a person may sign his name by the hand of another thereunto authorized.

POINT IV.

In any event the contract was so far executed as not to be within the operation of the statutes requiring contracts made by the Secretary of War or the Quartermaster General or any officer under them to be in writing and signed by the parties.

The Court of Claims so held, in conformity with the decisions of this Court. (Op., Rec. 72-74.)

1. That complete performance by the contractor takes the case out of the operation of the statutes requiring contracts with the War Department to be reduced to writing and signed by the parties, was definitely settled in *United States v. R. P. Andrews & Co.*, 207 U. S. 229, 52 L. ed. 185.

There, the War Department entered into a contract with Andrews & Company, in the form of an offer and acceptance contained in letters, for a quantity of paper for the use of the Government in the Philippine Islands. No more formal contract was executed. Andrews & Company delivered the paper to a shipping company for transportation to the Philippines, as directed. The paper was so damaged by water in the course of transportation that it was unfit for use. The proper authorities of the Philippine Government refused to accept it and directed that it be stored subject to the order of Andrews & Company, who were notified. Thus, while title to the paper technically passed by virtue of delivery to the carrier,¹

¹ Not irrevocably, however, for as stated in *Pope v. Allis*, 115 U. S. 362: "The authorities cited sustain this proposition, that when a vendor sells goods of a specified quality but not in existence or ascertained, and undertakes to ship them to a distant buyer, when made or ascertained, and deliver them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier, does not

the Government never actually received it through any of its own officers. Payment being refused, Andrews & Company brought suit *on the contract for the contract price*,¹ and got judgment. One of the Government's points was that—

“The contract was in violation of law, and void, on account of its not having been reduced to writing and signed by the parties, in accordance with U. S. Rev. Stat., § 3744, and there can therefore be no recovery *on the contract.*” (52 L. ed. 186.) [Italics ours.]

This Court, without accepting the contention that the offer and acceptance contained in the exchange of letters fell short of satisfying § 3744,² held that—

necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract.” (P. 372.) And again in 23 Rul. Cas. Law, p. 1433: “Assuming that the title vests in the buyer on delivery to the carrier, it is at most, as between the parties, a conditional title subject to the right of inspection and rejection on arrival at the point of destination for non-compliance in quality, etc., with the terms of the contract.”

¹ The petition is specific in basing the claim on an express contract growing out of the letters set forth in the Court's opinion. There is not a suggestion in it or in the briefs of a count based on *quantum meruit*. (See page 1, of the record, Case No. 44, Records and Briefs, U. S. Supreme Court, October Term, 1907.) So, also, the opinions of both this Court and the Court of Claims show that the case was dealt with as one based on an express contract. *Quantum meruit* as a basis of recovery was never even suggested.

² The fact is that that contention was advanced by the Government in the most half-hearted way and as an after-thought. It was not made at all in the Court of Claims, where the case was decided on the theory that the letters containing the offer and acceptance constituted a contract binding upon the United States. (41 Ct. Cl. 48; see also brief for claimant in this Court, pp. 20-21, Case No. 44, Records and Briefs, U. S. Supreme Court, October Term, 1907.) It was not even included in the assignments of error or in the statement of the questions in the Government's brief in this Court. (See Government's brief, pp. 5-6, Case No. 44, Records and Briefs, U. S. Supreme Court, October Term, 1907.) It was first mentioned on the last page

"noncompliance with the section referred to is immaterial after the contract has been performed." (207 U. S. 243, 52 L. ed. 191, citing *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159, 163, 48 L. ed. 130, 132.)

The importance of this decision lies in the fact that the action which was sustained was not upon a *quantum meruit* for the value of goods delivered under an unenforceable contract, but *upon the contract itself for the full purchase price* on the theory that performance by the contractor took the case entirely outside the operation of § 3744.

This case was approved in *Willard, Sutherland & Co. v. United States*, 262 U. S. 489, 67 L. ed. 1086, holding that a contract which was unenforceable against the United States at its inception for lack of consideration and mutuality, "became valid and binding to the extent that it was performed." (262 U. S. 493, 494.)

If, then, Swift & Company completely performed its part of the contract in the present case it becomes immaterial whether the statute requiring contracts with the War Department to be reduced to writing and signed by the parties was complied with.

The facts already stated show that Swift & Company

of a brief of fifty-seven pages. It was not mentioned at all by this Court in stating the questions involved in the case. (207 U. S. 238.) The opinion of the Court throughout, until the very end, discussed the case on the theory that the letters constituted a good contract. (207 U. S. 238, 240, 241, 243.) At the very end the opinion noticed for the first time the belated contention that Revised Statutes, § 3744, had not been complied with, and, as stated in the text above, without accepting the contention, disposed of it with the statement that noncompliance with the statutes is immaterial after the contract has been performed. The case, therefore, is really an authority upon the point that a contract embodied in letters satisfies § 3744, as well as upon the point that noncompliance with that section is immaterial after a contract has been performed.

manufactured the entire quantity of bacon called for by the contract as modified by the notices of January 24 and March 5; that the Government inspected the manufacture of the entire quantity and found it to conform with the required specifications; that the January and February instalments were delivered, accepted and paid for; that delivery of the March instalment was duly tendered but that actual delivery was prevented by the refusal of the Depot Quartermaster to furnish shipping instructions. (*Ante*, 10, 11.) This constituted complete performance by Swift & Company.

The Government says no to this, *first*, because Swift & Company did not complete the preparation of the entire 6,000,000 pounds of bacon ordered for March delivery but only the quantity which was already in process when it received the Depot Quartermaster's notice of January 24 to put no more in cure (Government's Brief, p. 53); *second*, because there could be no performance without delivery and no part of the March instalment was delivered. (Government's Brief, p. 54.)

The answer to the first point is that the effect of the notices of January 24 and March 5 (at least upon acquiescence therein by Swift & Company), was to reduce the quantity of bacon called for by the contract to what was already in process at the time those notices were received; that thereafter Swift & Company could not have been required to manufacture any greater quantity nor could the Government have been required to accept or pay for any greater quantity; that consequently when Swift & Company completed and tendered, as it did, the entire quantity of bacon that was in process when these notices were received, it completed and tendered the entire quantity called for by the contract as thereby modified.

The Government rejoins that the notices of January 24 and March 5 were ineffective under Revised Statutes, § 3744,

to modify the quantity called for by the contract. (Government's Brief, p. 56.) This Court has decided that the time of performance of a contract within the operation of Revised Statutes, § 3744, can be extended by even an *oral* agreement. (*Salomon v. United States*, 19 Wall. 17, 19, 20, 22 L. ed. 46, 47; *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 45 L. ed. 948; *Maryland Steel Co. v. United States*, 235 U. S. 451, 460, 59 L. ed. 312, 316.) It would certainly seem to follow that the quantity can be reduced without making a new contract in writing, especially when it can fairly be said from the course of dealing between the parties that the original contract contemplated that the Government would have the right to reduce the quantity by giving timely notice.

The Court of Claims concluded its discussion of this feature of the case with this apt statement:

"It seems quite clear then, for the purposes of the stated rule as to the effect of performance, the plaintiff is entitled to the benefit of full performance. It was to its credit that it made no objection to complying with the instructions of General Kniskern and it would be inconceivable to invoke a rule which should penalize it for so doing. It should not be put in a worse position by the refusal of the defendant to accept full performance and be made to suffer by reason of its willingness to accede to modifications of the contract prompted by the best interests of the Government. It did all that it was asked to do, and so far as obligations were laid upon it the contract was fully performed." (Op., Rec. 73-74.)

As regards the contention that there could be no complete performance of the contract without actual delivery of the March instalment, the best test of complete performance by a seller under an executory contract of sale is whether he has done everything that he must do in order to maintain

an action for the contract price. Of course, at any stage of performance, he may maintain an action for *damages* if wrongfully interfered with by the buyer, but ordinarily he is entitled to sue for the *contract price* only when he has completely performed his part of the contract.

In the case of contracts for the manufacture of a special kind of article, according to specifications furnished by the buyer, and for which there is no general market, the decisions are substantially uniform to the effect that performance is complete, so as to entitle the seller to sue for the contract price, when the manufacture of the article has been completed in accordance with the specifications and delivery *tendered*, and that the buyer cannot avoid this result by refusing to receive the article, for in that case he will be presumed to have waived actual delivery.

Leading cases to this effect are cited below.¹ A representative one is *Fisher Hydraulic Stone & Machinery Co. v. Warner*, 233 Fed. 527, C. C. A. 2nd. There, the plaintiff contracted to sell to the defendant certain machinery and fittings, to be delivered f. o. b. cars Mt. Gilead, Ohio, and to be installed under the supervision of a representative of the plaintiff. Plaintiff manufactured the machinery, had it brought to Mt. Gilead ready to be loaded on cars, and called upon the defendant for shipping directions. These were never forthcoming, however, and the plaintiff brought suit to recover the balance of the contract price, an initial payment having been made when the contract was executed. The action was sustained, the Court saying:

¹ *Bookwalter v. Clark*, 10 Fed. 793; *Kinkead v. Lynch*, 132 Fed. 692; *Manhattan, etc., Railway Co. v. General Electric Co.*, 226 Fed. 173, C. C. A. 8th; *Fisher Hydraulic Stone & Machinery Co. v. Warner*, 233 Fed. 527, C. C. A. 2nd; *Hardy v. United States*, 9 Ct. Cl. 244; *Bement v. Smith*, 16 Wend. 492; *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313; *Black River Co. v. Warner*, 93 Mo. 374; *Moline Scale Co. v. Beed*, 52 Ia. 307. See also note to *Pate v. Ralston*, 51 L. R. A. (N. S.) 735, IV, a, p. 746; V, b, p. 754.

"The earliest case perhaps where a vendor recovered the purchase money against who refused to accept the article sold was *Bement v. Smith*, 15 Wend. (N. Y.) 493. There the defendant had orally agreed to purchase a sulky to be manufactured by the plaintiff for him which the defendant arbitrarily refused to accept. The discussion was principally as to the statute of frauds and the court awarded the vendor the purchase price. While the cases of contracts to manufacture an article have always been treated in the law of sales as *sue generis*, they seem to have been the source of the New York doctrine, which now goes the whole length of allowing any seller to recover the purchase price when the buyer refuses to accept the goods and the seller has held them for the vendee's account, irrespective of whether title has passed or not. *Dustan v. McAndrew*, 44 N. Y. 72; *Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. Rep. 728; *Gourd v. Healy*, 206 N. Y. 423, 99 N. E. 1099.

"We do not need to go as far as this, and prefer to limit our decision to cases where the goods are of a special kind, having no ordinary market value." (P. 529.)

In *Armour & Co. v. Sherburne Co.*, 300 Fed. 81, C. C. A. 1st, the rule that the buyer cannot prevent the seller's performance from being complete by refusing to accept delivery was applied in the case of an executory contract for the sale of an ordinary article of commerce—sugar. The seller was ready and able to deliver the sugar as called for in the contract. In advance of the delivery date the buyer announced, for reasons not necessary to state, that it would not take a part of the sugar. The suit was not based, however, upon this anticipatory breach, "but upon *performance* on the part of the Sherburne Company [the seller] and a refusal on the part of the defendant [the buyer] to accept *performance*." (P. 83.) [Italics ours.] The action was

sustained, the Court holding that performance of the contract on the part of the seller was complete, without even tender of delivery (in view of the buyer's announcement in advance that it would not accept delivery), when the seller put itself in position to make delivery. The opinion states that—

"as the action is based upon *performance* and non-acceptance and the evidence shows that the Sherburne Company was able and ready to perform by a presentation of warehouse receipts or a delivery of the sugar itself, *the jury were warranted in finding that the Sherburne Company had fully performed its part of the contract* and that it was unnecessary for it actually to tender the warehouse receipts or the sugar, for to do so would be a useless thing in view of Armour & Co.'s absolute refusal of September 3, which it thereafter persisted in, to accept performance (*Hutt v. Hausman*, 118 Misc. Rep. 448, 193 N. Y. Supp. 452; *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.*, 221 N. Y. 120, 116 N. E. 1073; *Strasbourg v. Leerburger*, 233 N. Y. 55, 135 N. E. 920; *Landes v. Klopstock*, 252 Fed. 89, 164 C. C. A. 201)." (P. 83.) [Italics ours.]

It follows that Swift & Company's performance was complete, making it immaterial whether the statutes requiring contracts with the War Department to be in writing were complied with.

The Government seems to think that our contention with respect to performance rests upon the theory of *one entire* contract covering the three months' deliveries, and it argues at some length in an attempt to show that that is not the case but that there were three *separate* contracts, one for each month's delivery. (Government's Brief, pp. 52, 54-57, 60.) Unquestionably there was one entire contract. (See

post, 84, 85.) But either view may be taken so far as the present point is concerned. If there were one entire contract, that was performed by the delivery of the quantities called for in January and February, respectively, and by the manufacture and tender of the quantity called for in March as modified by the notices of January 24 and March 5. On the other hand if the transaction was divisible into three separate contracts, one for each month, the contract for March was performed by the manufacture and tender of the quantity called for in that month.

The Government cites in its discussion of the question of performance the case of *Dusenberg Motors Co. v. United States*, 260 U. S. 115, 67 L. ed. 162. Just what connection that case has with either this or any other point in the present case we are unable to see. The claim there was in the alternative, for losses alleged to have resulted from certain delays on the part of the Government, or for anticipated profits lost by the termination of the contract. The Court held, *first*, that the delays were contemplated by the contract, and that in any event the claimant made no complaint at the time; and, *second*, that as the contract was terminated in accordance with its own provisions, there could be no claim for anticipated profits.

2. It may be argued that in *United States v. R. P. Andrews & Co., ante*, although the United States never received or accepted the goods, title did in fact pass by the delivery of the goods to the carrier, and, therefore, when the Court said that noncompliance with § 3744 is immaterial after the contract has been performed, it was referring only to a contract which had become *executed* by the passing of title.

Complete performance by the seller in an executory contract of sale generally vests title to the goods in the buyer.

There may be cases, however, of complete performance by the seller without title passing (*Bookwalter v. Clark*, 10 Fed. 793, 797);¹ and we stand upon the proposition that if there has been complete performance by the seller the case is taken out of the statute regardless of whether title has technically passed.

But in the present case title *did* pass. The question of when title passes under an executory contract of sale depends, of course, upon the intention of the parties. Where, as is usually the case, the intention is not expressed, it has to be determined by presumptions.

Where the contract is for the sale of an article of a special kind to be manufactured according to the buyer's own specifications and for which there is no general market, the law is settled that, in the absence of evidence to the contrary, the parties will be presumed to have intended title to pass upon completion and tender of the article in accordance with the contract, and that consequently the buyer cannot prevent title from passing by refusing to receive the article. In fact many of the cases state this broadly as the rule applicable to articles manufactured to order, without the further restriction that they must also be articles for which there is no general market.

In the leading Massachusetts case of *Goddard v. Binney*, 115 Mass. 450, 15 Amer. Rep. 112, it was held, quoting from the syllabus:

"When the vendor has done everything he was to do under an executory agreement for the manufacture and sale of a specific chattel, which was to be manufactured in accordance with the terms of the agreement, *and has given notice thereof to the pur-*

¹ Thus, a contract may make the passage of title dependent upon the doing of some act by the buyer; for example, payment.

chaser, the general property in the chattel vests in the purchaser, and the chattel is at his risk." [Italics ours.]

This Court in *Clarkson v. Stevens*, 106 U. S. 505, adopted the following statement of the rule from another Massachusetts case, *Williams v. Jackson*, 16 Gray 514:

"Under a contract for supplying labor and materials and making a chattel, no property passes to the vendee until the chattel is completed and delivered *or ready to be delivered*. This is a general rule of law. It must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract." (106 U. S. 514.) [Italics ours.]

In *McElwee et al. v. Metropolitan Lumber Co.*, 69 Fed. 302, C. C. A. 6th, the contract was for the sale of the entire product of a lumber mill in Michigan for the forthcoming season, delivery to be made at Chicago. The contract provided that the quantity of lumber manufactured each month should be ascertained by inspectors on the first day of the succeeding month, and that thereupon the buyer should give his notes, due in 90 days, for the price, less freight to Chicago. A controversy arose involving a number of points, one being when the contract became executed so as to pass title to the lumber to the buyer.

The Court, consisting of Taft and Lurton, Circuit Judges, and Severens, District Judge, held, Judge Lurton writing the opinion:

"Though the agreement was originally executory, being for the sale of lumber to be manufactured, yet, when the product of a particular month was completed, and it had been inspected and measured, there was a complete bargain and sale of the lumber thus

designated. That particular lumber became appropriated to the contract, and the vendee under the agreement was obliged to make his promissory note to the vendor for the price, payable 90 days after date. The element necessary to a perfect and complete sale was supplied by the appropriation of a particular lot of lumber to the contract." (P. 305.)

The Court further held that upon the execution by the buyer of his promissory note for the price the right of possession would also vest in the buyer. (P. 305.)

In *Kinkead v. Lynch*, 132 Fed. 692, completion and tender of the article was held to constitute complete performance by the seller and to pass title to the buyer, notwithstanding the latter's refusal to accept delivery, the Court saying:

"All subsequent conditions were waived by reason of their [the buyers'] refusal to accept or pay for the articles. The general rule is that a chattel ordered to be manufactured continues to be the property of the manufacturer until it is completed and delivered or tendered. 1 Benj. on Sales, § 536; Tiedeman on Sales, § 89. *The tender, if made and refused, takes the place of delivery and acceptance.*" (P. 696.) [Italics ours.]

In *J. George Leyner Engineering Works Co. v. Mohawk Consol. Leasing Co.*, 193 Fed. 745, the plaintiff contracted to sell certain machinery to the defendant, to be manufactured according to order, and to be delivered on board cars at Goldfield, Nevada. (Pp. 745-746.) He completed the manufacture of the machinery, tendered delivery of it at Goldfield and offered to load it on cars, all as called for by the contract. (Pp. 746, 747.) The defendant refused to accept delivery. (P. 747.) It was held that title had passed

to the defendant and that the plaintiff was entitled to the contract price, the Court saying:

“* * * Plaintiff thus performed all the conditions of the contract so far as it was able to do so. We must presume that plaintiff is without fault, and the machinery was manufactured in compliance with the contract. The fact that defendant refused to accept delivery of the machinery is not one for which plaintiff is in any wise at fault. It would be unjust to plaintiff that it should be put in a worse position by the default of defendant than it would have been if the defendant had fulfilled its part of the contract. The contract is executed so far as any of its obligations lay upon the plaintiff. Under it there remains nothing further for the plaintiff to do. Plaintiff has performed the contract. Defendant has broken it. Plaintiff has earned the contract price of the machinery.” (P. 747.)

“* * * *The tender of a completed chattel, according to the terms of sale, by a vendor who is without fault, even though refused by the vendee, is tantamount to delivery.*” (P. 748.) [Italics ours.]

In *Smith v. Wheeler*, 7 Ore. 49, the manufacture of the article was completed and the buyer was notified that it was ready for delivery but refused or neglected to furnish the necessary shipping directions. It was held, nevertheless, that title had passed to him, the Court saying:

“Yet when the subject of the sale is a specific article of property to be manufactured by the vendor for the vendee, and the former has completed the contract and performed all that he is required to do under it, there seems to be no good reason why he should not be entitled to recover the price agreed upon in the contract. Here it is not strictly the case of a sale of merchandise. The respondents agreed to make certain machinery according to the direction of the ap-

pellants, and to furnish the necessary materials for it. When it was completed and ready for delivery the appellants neglected or refused to furnish the cars upon which it was to be delivered, as they had agreed to do. Under these circumstances, we think the right of property was already in them." (P. 51.)

In Mechem on Sales, § 754, the decisions on this point are summed up as follows:

"The question of the time when the title will pass to goods which have been ordered to be manufactured is involved in some little conflict of decision, though the decided tendency of the authorities in the United States is clear. Under a contract for the manufacture of an article, as for the building of a ship or the construction of any other chattel, not existing in specie at the time of making the contract, it is the general rule that no title vests in the purchaser during the progress of the work, nor until the chattel is finished and delivered, or, at least, is ready for delivery, and, by tender or other equivalent act, is appropriated to the buyer. A few cases hold that the title will not pass until there has been, on the part of the buyer, either an acceptance of the chattel or some 'acts or words respecting it from which an acceptance can be inferred.' But, by the weight of authority, acceptance by the buyer is not indispensable; if the chattel is produced at the time, and of the kind and quality specified, and in all other respects in compliance with the order, so that the buyer ought to accept it, *the title will pass upon a tender or offer of delivery even though the buyer refuses to accept it.*" [Italics ours.]

Bennett's 6th American edition of Benjamin on Sales is to the same effect (p. 314):

"As to articles expressly manufactured for a party, it seems clear that, upon completion according to the

contract, and a delivery, *or tender of delivery*, to the buyer, the appropriation is complete and the title fully passes. *Bement v. Smith*, 15 Wend. 493, a leading case; *Higgins v. Murray*, 4 Hun 565; *Ballentine v. Robinson*, 46 Pa. St. 477; *Shawhan v. Van Nest*, 25 Ohio St. 490, a well considered case; *Mt. Hope Iron Co. v. Buffinton*, 103 Mass. 62; *Goddard v. Binney*, 115 Mass. 450; *Spicers v. Harvey*, 9 R. I. 582; *McIntire v. Kline*, 30 Miss. 361; *Gordon v. Norris*, 49 N. H. 376, containing a full citation of the authorities. * * *. [Italics ours.]

Likewise, Sutherland on Damages, 3rd ed., § 644:

"When articles are ordered to be manufactured they are treated as the property of the vendee when made, and notice thereof given to him with request to take them away. The vendor has then an immediate right of action for the price." (P. 1849.)

Even in the case of contracts for the sale of ordinary articles of commerce, for which there is a ready market, courts of high authority hold that tender of the article in accordance with the contract passes title and that the buyer cannot prevent title from passing by refusing to receive the article.

A recent example is *Turner-Looker Co. v. Aprile*, 234 N. Y. 517, affirming 195 App. Div. 706. That was the case of a contract for the sale of a quantity of whiskey, entered into by an exchange of telegrams. Warehouse receipts for whiskey of the specified quality were tendered to the buyer in due time. He refused to accept the receipts or the whiskey. The seller sued for the purchase price "on the theory that the title had passed." (195 App. Div. 711.) The defense was that there had been no delivery of the goods, and consequently no passing of title, and that, therefore, whatever damages the seller might be entitled to for

breach of contract, no action for the purchase price would lie. (195 App. Div. 708-710.) The action was sustained, however, the Appellate Division holding that—

“the tender of the bonded warehouse receipts constituted a valid tender of delivery of the ten barrels of whiskey in question, and the *tender of performance*, by the tender of delivery of the warehouse receipts, *was equivalent to an actual delivery* or a tender of physical delivery of the whiskey in question.” (195 App. Div. 710, citing cases.) [Italics ours.]

The Court of Appeals affirmed the judgment on this ground. (234 N. Y. 518.)

The Appellate Division based its judgment largely on an earlier decision of the Court of Appeals in *Hayden v. Demets*, 53 N. Y. 426, which held:

“Upon a valid sale of specific chattels, when nothing remains to be done by the vendor except delivery, whether conditioned upon payment or not, the right of property passes to the vendee, at whose risk it is retained by the vendor. *The same consequence as to title results from a valid tender, upon an executory contract.*” (P. 431.) [Italics ours.]

In *Birdsong v. Jordan*, 297 Fed. 742, the Circuit Court of Appeals, 2d Circuit, stated the rule as follows:

“*A proper tender of delivery is equivalent to an actual delivery, and vests title in the purchaser*, so that in spite of the purchaser’s actual refusal to accept, the title passes, and the seller had a right to maintain an action for the purchase price.” (P. 744.) [Italics ours.]

In *Kawin & Co. v. American Colortype Co.*, 243 Fed. 317, C. C. A. 7th, the plaintiff contracted to sell to the defendant a large number of Christmas and New Year cards. After

some of them had been delivered and paid for, the plaintiff tendered delivery of the balance in accordance with the contract, but the defendant refused to take them. Suit was brought for the purchase price on the theory that property in the cards had passed to the defendant. (P. 319.) The action was sustained on that theory, the Court saying:

"* * * The contract was an Illinois contract. Under the decisions of that State (*Bagley v. Findlay*, 82 Ill. 524; *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869), plaintiff had the option, under the facts of this case, to sue for the contract price—in effect, to vest defendant with title, notwithstanding his dissent. This the plaintiff did. The cards had all been appropriated to defendant." (P. 323.)

As stated in the passage quoted above from Mechem on Sales, there are a few cases holding that title to goods manufactured to order does not pass unless in addition to completion and tender of the goods by the seller the buyer assents to the appropriation of the goods to the contract.

Since those cases are not representative of judicial opinion in the United States we might dismiss them on that ground from further consideration. It will be found, however, that in practical application the rule as stated in those cases is not in conflict with the prevailing rule. This is so because the courts holding such assent by the buyer to be necessary say that it may be either express or implied, and may be given before, after or at the time of the appropriation of the goods to the contract by the seller, according as the parties may intend. (*Moody v. Brown*, 34 Me. 107, 56 Am. Decs. 640; *Atkinson v. Bell*, 8 B. & C. 277.) When, therefore, one contracts for the manufacture of an article to his special order he will be presumed to assent in advance to the appropriation of the article to the contract when completed in accordance with the specifications. In other words, from the very nature

of such a contract it will be presumed, in the absence of any provision to the contrary, that both parties intended title to pass upon completion of the article in accordance with the contract and notice to the buyer that it is ready for delivery. Thus in *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807, after a full review of the cases of this character, the Court says:

"As the passing of title is a question of intention, to be ascertained from the facts and circumstances, in the absence of an express stipulation as to when it shall pass; and it appears that the article so specially made was intended for no person other than him who ordered it, not the manufacturer for his own use or for sale in the market generally,—it seems clear that the intention was that the article should become that of the former *on the completion thereof*. Cases of this kind are regarded as exceptions to the general rule respecting the vesting of title." (17 L. R. A., N. S., 816.) [Italics ours.]

This reasoning has special force in the present case. The contract here was for a peculiar product, to be manufactured according to the specifications of the Government and under its supervision. It was, moreover, urgently needed by the Government. On the other hand it was not the kind of product which the manufacturer ever made for anyone else or which anyone else wanted. Clearly, in such a case the buyer must be presumed to have assented in advance to the appropriation of the article to the contract when completed in accordance therewith.

Besides this inference from the nature of the contract, inspection of the product by officers of the Government during all stages of manufacture was an express recognition of its appropriation to the contract. Thus in *Malcomson v. Reeves Pulley Co.*, 167 Fed. 939, C. C. A. 6th, the Court said:

"It is undoubtedly the rule that if the Aerocar Company had been represented by an inspector as the engines were manufactured and tested, and had such engines been allowed to pass without objection, an acceptance would thereby have been accomplished under the terms of the contract so thoroughly as to preclude a subsequent defense of failure to meet the warranty." (P. 944.) [Italics ours.]

Suppose that after the product had been completed under these conditions and tendered but before actual delivery to the Government Swift & Company had attempted to divert it into other hands. Would anybody question that the Government could have successfully claimed that title had already vested in it, and would not have been remitted to a mere action against Swift & Company for damages for breach of contract?

It follows that the contract in the present case had become executed by the passage of title and therefore is outside the operation of Revised Statutes, §3744, under the narrowest possible construction of the decision of this court in *United States v. R. P. Andrews & Co.*, *ante*, 59.

The Government lays emphasis upon the fact that in that case the goods had been actually delivered (to the carrier, at least), whereas here there had been only a tender of delivery. This misses the real point. Whether a contract of sale has become executed depends not upon delivery but upon the passing of title. When title has once passed, it makes no difference how—whether by delivery to the buyer, by delivery to a carrier for transportation to the buyer, by tender of delivery, or otherwise—the contract has become executed. True, delivery usually marks the passing of title, as it did in the *Andrews Case*. But it is not the only way of passing title. There may be delivery and no passing of title, and on the other hand title may pass without delivery.

3. Finally, if the facts of the present case fell short of *complete performance* by the contractor and necessarily therefore short of passing title to the goods, we would still have a case of substantial *part performance* under circumstances which would result in grave injustice to the party performing if the contract were not held enforceable against the other party, to the extent, at least, that it had been performed.

By §17 of the Statute of Frauds, relating to the sale of goods, "part performance of either side is in terms made a satisfaction of the statute, and, therefore, after such part performance, recovery may be had on the contract itself." (3 Williston on Contracts, §1770, p. 3078.)

On the other hand, §4, relating to real estate, does not in terms make part performance a satisfaction of the statute. The courts, however, have long held that part performance satisfies §4 equally with §17; or, what comes to the same thing, "takes the contract out of the operation of the statute." (*Union Pacific Railway Co. v. McAlpine*, 129 U. S. 305, 312-314.)

What constitutes part performance for this purpose is thus stated in *Williams v. Morris*, 95 U. S. 444:

"Nothing is part performance for this purpose which is only ancillary or preparatory; it must be a direct act which is intended to be a substantial part performance of an obligation created by the contract as proved; and it must be an act which would not have been done but for the contract; and it must be directly in prejudice of the party doing the act, who must himself be the party calling for the completion of the contract." (95 U. S. 457.)

Revised Statutes, §3744, should be similarly construed, since it was intended to operate as a statute of frauds (*Clark v. United States*, 95 U. S. 539, 542; *United States v. N. Y. &*

Porto Rico S. S. Co., 239 U. S. 88, 92), and "both have the same purpose * * * and both are subject to the same reasons and rules of construction." (*Jones v. United States*, 11 Ct. Cl. 733, 740.)

Indeed there is greater liberty of judicial action in this regard under §3744 than under the Statute of Frauds. Section 3744 does not make contracts which have not been reduced to writing and signed by the parties illegal or void, but only unenforceable against the United States. (*United States v. New York & Porto Rico S. S. Co.*, 239 U. S. 88, 92; *Ackerlind v. United States*, 240 U. S. 531, 534.) And even that was not required by the terms of the section but was an implication drawn by the Court in *Clark's Case*, 95 U. S. 539.

On the other hand, the Statute of Frauds provides *expressly* that contracts within its provisions shall not be enforceable. This difference was adverted to in *United States v. New York & Porto Rico S. S. Co.*, ante, where the Court said, referring to §3744: "The statute does not address itself in terms to the effect of the form upon the liability of the parties like the Statute of Frauds." (239 U. S. 92.) "Whatever effect it has in that way," the opinion continues, "is not a matter of interpretation in the strict sense, but is *implied*." (239 U. S. 92.) And the Court added—very significantly, it would seem—"The extent of the implication is to be gathered from the purpose of the section and such other considerations as may give us light" (239 U. S. 92), thus leaving the way open to avoid making §3744 an instrument of injustice.

It may be said that the rule that *part performance*¹ takes a case out of the Statute of Frauds is a ground for relief in equity only and not at law. That makes no difference here, however. Of course, the Court of Claims does not possess the

¹ As distinguished from *complete performance* by one or both parties. (Ante, 59-77.)

peculiar powers of a court of equity, such as the power to decree specific performance or to issue injunctions. But since the Act of March 3, 1887, 24 Stat. 505, it *has* had power to determine "the *money relief* to which the claimant is entitled, whether based on an *equitable* or a legal cause of action." (*District of Columbia v. Barnes*, 197 U. S. 146, 152. See also *United States v. Jones*, 131 U. S. 1, 16, 18; *United States v. Milliken Imprinting Co.*, 202 U. S. 168, 173-174.) The text of the pertinent part of the Act of March 3, 1887, is set forth in the margin below.¹ Referring to this provision this Court said in *United States v. Jones*, *ante*:

"The jurisdiction here given to the Court of Claims is precisely the same as that given in the Acts of 1855 and 1863, with the addition that it is extended to 'damages * * * in cases not sounding in tort' and to *claims for which redress may be had either in a court of law, equity or admiralty.*'" (131 U. S. 16.) [Italics ours.]

In other words, any *right or claim* under a contract which a court of equity would enforce, and which can be satisfied by a money judgment, can be enforced in the Court of Claims.

In *United States v. Milliken Imprinting Co., ante*, this Court, upholding the exercise by the Court of Claims of the power to reform a contract so as to pave the way for a money judgment, said:

"The government objects at the outset that the court of claims has no jurisdiction in equity, and that,

¹ "All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort in respect of which claims the parties would be entitled to redress against the United States, either in a court of law, equity or admiralty if the United States were suable." [Italics ours.]

although the petitioner's demand is for money under a contract as it should have been drawn, yet, in this suit, that demand is incident to the reformation asked, which certainly is true. Reformation is not an incident to an action of law, but can be granted only in equity. When relief is granted also on the contract as reformed, it means only that the court of equity see fit to go on and finish the whole case. But we are of opinion that the court was warranted in taking jurisdiction under a fairly liberal interpretation of the act of March 3, 1887, chap. 359, § 1, 24 Stat. at L. 505, U. S. Comp. Stat. 1901, p. 752. That section gives the court of claims jurisdiction of 'all claims founded * * * upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable.' *A claim for money upon a contract, which would be like a right of action at common law but for the need of help from equity to establish the contract, seems to us to fall within these words, in their obvious literal sense.* *District of Columbia v. Barnes*, 197 U. S. 146, 150, 152, 49 L. ed. 699-701, 25 Sup. Ct. Rep. 401; *South Boston Iron Works v. United States*, 34 Ct. Cl. 174, 200." (202 U. S. 173-174.) [Italics ours.]

Equally it may be said here that we have a claim for money upon a contract, which would be like a right of action at common law but for the need of help from equity to establish the contract.

It would be impossible to conceive of a case more fitting for the application of the rule of part performance than the present one. The Government not only stood by and per-

mitted Swift & Company to proceed with the manufacture of the article on the faith of the contract arising out of the written offer and acceptance, but through its duly authorized agents inspected the article day by day as it was being manufactured and passed it as conforming with the required specifications. Furthermore, the article was a special one. There was no general market for it. Nobody used it but the Government. If the Government did not take it, no other disposition could be made of it except at a great loss. More even than this, the country was at war. The contract was for an article of food for the Army of which Swift & Company and the other large packers were practically the sole source of supply. At the conference of November 9, 1918, when they were informed of the Army's needs for the months of January, February and March, 1919, the Depot Quartermaster, as the Secretary of War's opinion in this case states, "used language of determination and authority in saying that he proposed to have those needs satisfied." (Decls. App. Sec. War Dept. Cl. Bd., Vol. VII, pp. 167-168.) The War Department itself had discarded formal written contracts in the purchase of meat supplies for the Army during the War and the Judge Advocate General had held that they were unnecessary. (*Post*, 90.) Under these conditions how could Swift & Company do anything else but proceed to fill the Depot Quartermaster's orders without waiting for any more formal document? Under circumstances less compelling this Court, through the Chief Justice, recently said, "We cannot ignore the suggestion of duress there was in the situation." (*Freund v. United States*, 260 U. S. 60, 70.)

The Attorney General himself has held that *part* performance takes a contract out of the statute and renders it enforceable against the Government as well as against the contractor to the extent that it has been performed. (32 Op. A. G. 114.) The facts were as follows: On November 17,

1917, the War Department gave an order to the Calco Chemical Company for the erection of a plant at the Government's expense, but on the Company's land, and for the manufacture at such plant of 1,000,000 pounds of TNA. As part of the consideration the plant buildings were to become the property of the Company at the termination of the War, and the Company was also to have the option of purchasing the plant tools and machinery. This order was accepted December 14, 1917. It bore a notation that when accepted a contract would be prepared. The plant was erected and a "trifling" part of the product had been manufactured and delivered when in December, 1918, the company received notice to suspend operations under the contract. Subsequently, in January, 1919, a formal written contract covering the order was executed, but as the product was no longer needed this document was treated by the Attorney General as a mere ratification of the prior contract without any contractual force of its own. The real question, therefore, was whether the order of November 17, 1917, and its acceptance, followed by part performance,¹ created a contract which bound the United States. The Attorney General held:

"In addition, according to the statement, the contract was acted upon, performed according to its terms, by both parties until December, 1918, when performance was discontinued at the request of the United States. Even if the procurement order and its acceptance constituted only an informal or invalid contract, it would have become binding on the parties by performance. *St. Louis Hay & Grain Company v. United States*, 191 U. S. 159." (32 Op. A. G. 122.)

¹ Consisting of the erection of a plant by the contractor *with money furnished by the United States*, and in the manufacture and delivery of a *trifling* part of the quantity of product contracted for.

The Government contends that there can be no part performance without actual delivery of a part, just as it contended that there can be no complete performance without actual delivery of the entire quantity.

We have already shown that delivery is not essential to performance—that tender is sufficient. (*Ante*, 63-66.) But there *was* actual delivery of a part in the present case.

The contract called for 17,500,000 pounds of serial 10 or canned bacon, 6,000,000 pounds to be delivered in January, 5,500,000 pounds in February, and 6,000,000 pounds in March. (Finding XVI, Rec. 36.) Part of this bacon, *i. e.*, the January and February instalments, was not only manufactured but delivered and paid for. (Finding XXII, Rec. 44.) The March instalment was completed and tendered.

This leaves the Government no escape, even on its own view of the law, unless, as it laboriously attempts to maintain, Swift & Company's offer of November 12, 1918, and the Depot Quartermaster's order of December 10 accepting it did not constitute *one entire contract* for 17,500,000 pounds of bacon deliverable in three monthly instalments, but *three separate contracts*, one for each month's instalment.

In support of this contention the Government says, *first*, that there was no stipulated gross amount divided into *equal* monthly deliveries; *second*, that separate circular proposals were sent out covering each month's instalment; *third*, that the price for each month's instalment was arrived at and paid separately; and, *fourth*, that a separate purchase order was issued for each month's instalment. (Government's Brief, pp. 53-59.)

To which we reply, first, that a gross amount *was* stipulated, namely, 17,500,000 pounds (Finding XVI, Rec. 37), and that while it was immaterial whether the instalments were

equal or not, in fact they *were* practically equal, making allowance for the fewer days in February.

With respect to the sending out of separate circular proposals covering each month's instalment, and the arriving at the price for each month's instalment separately, and the issuance of a separate formal purchase order for each month's instalment, we have already shown that these were mere incidents of the allotment system of procurement in force during the War, and that they all took place long after the contract fixing the rights of the parties had been concluded (*Ante*, 5, 6.)

Furthermore, as the opinion of the Court of Claims points out:

"From the inception of the transaction here involved bacon for January, February, and March deliveries was the matter to which the parties addressed themselves. At the conference of November 9, the total needs for the three months were made known. The plaintiff's proposal, the Food Administration's allotment, in so far as that is material, and General Kniskern's award all covered the three months. Any separation of the month of March and its treatment as a matter of independent negotiation, is, therefore, unauthorized." (Rec. 72.)

Clearly, therefore, there was one entire contract covering the three months' requirements.

In *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, where there was a contract for 5,000 tons of iron rails to be delivered at the rate of about 1,000 tons per month, payment to be made for each instalment as delivered, this Court held:

"The contract sued on is a *single contract* for the sale and purchase of five thousand tons of iron rails, shipped from a European port or ports for Philadelphia. *The subsidiary provisions as to shipping in different months, and as to paying for each shipment*

upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron." (115 U. S. 204, 29 L. ed. 368.)¹ [Italics ours.]

We repeat, therefore, that on the Government's own theory, that there can be no part performance without actual delivery of a part, the present case meets the test.

POINT V.

Contracts made in time of war or when war is imminent or to meet an emergency, as this one was, come within § 120 of the National Defense Act and/or § 3709 of the Revised Statutes, neither of which requires a written contract.

The discussion thus far has been on the assumption that the plaintiff must show that the contract satisfied the statutes requiring contracts with the War Department to be reduced to writing and signed by the parties, or else that it had been performed or executed. But contracts made in time of war or when war is imminent or to meet an emergency, as this one was, come within § 120 of the National Defense Act and/or § 3709 of the Revised Statutes, neither of which requires any particular form of contract.

1. National Defense Act, § 120.

The first paragraph of § 120 of the National Defense Act reads as follows:

"The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, *in addition to the*

¹ See also *Vulcan Trading Corp. v. Kokomo Steel & Wire Co.*, 268 Fed. 913, 915, and cases and authorities there cited.

present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry." (Act June 3, 1916, ch. 134, 39 Stat. 166, 213.) [Italics ours.]

The second paragraph provides that "compliance with all such orders for products or materials shall be obligatory, etc.," and prescribes a penalty to enforce compliance.

Both the Depot Quartermaster's order of December 10, 1918, and the Food Administration's allotment order of December 3, 1918, to the same effect, were issued in time of war.

While an armistice had been declared, peace had not been. Nor was it in any mere technical sense alone that a state of war still existed. Our Armies were still in the field in undiminished numbers, and no one then knew but that hostilities might be resumed. (See *Hamilton v. Kentucky Distillery & Warehouse Co.*, 251 U. S. 146.)

No particular form of order is required by the statute. Nor does the statute require it to be stated that the order is placed pursuant thereto. (*Moore & Tierney v. Roxford Knitting Co.*, 250 Fed. 278; aff. 265 Fed. 177, 178, C. C. A. 2nd; *certiorari* refused, 253 U. S. 498.)¹

¹ In the court below Government counsel made much of the fact that the War Department had a regular printed form which it used in placing orders under § 120. It was good practice for the War Department to adopt a regular form, but by so doing it could not change the effect of the statute. It could not exclude from it a case otherwise within it, nor bring within it a case otherwise excluded. (In re *Mellea*, 5 F. (2d) 687, 689.) The most that can be claimed is that failure to use the form in a proper case might be considered

Nor need the order be signed by the President or the head of a department. If it issue from the appropriate executive department by direction of the officer of that department having authority in that behalf, it is the order of the President. (*Wilcox v. Jackson*, 13 Pet. 513; *United States v. Eliason*, 16 Pet. 302; *McElrath's Case*, 102 U. S. 436; *Wolsey v. Chapman*, 101 U. S. 755; *M'Collum v. United States*, 17 Ct. Cl. 92, 101-102; *Medkirk v. United States*, 45 Ct. Cl. 395, 403; *Chicago M. & St. P. R. Co. v. United States*, 218 Fed. 295; 6 Op. A. G. 583, 587; 7 Op. A. G. 453, 480-482.) In the *Roxford Knitting Company Case*, *supra*, some of the orders were placed by a committee of the Council of National Defense and others by subordinate officers of the War and Navy Departments. Applying the principle stated, the Court held:

"We think that under this statute an order need not be signed either by the President or by the head of a department. It is enough that the order is the order of either, and there is a presumption that, when an order is sent out from the appropriate executive department in the regular course of business, such order is with the knowledge and approval of the secretary, unless the contrary appears." (265 Fed. 190.)

along with other evidence in determining whether the order was intended to be compulsory; but such intention being otherwise established, the omission is immaterial. One of the very points overruled in the *Roxford Knitting Company Case* was that the orders there in question were not within the operation of § 120 because not in the form prescribed by the War and Navy Departments for placing orders under that section.

Orders placed otherwise than in the prescribed form have been recognized by the War Department itself as compulsory orders. The order in the case of *Frank L. Young*, Dees., War Department, Bd. Cont. Adj., Vol. III, p. 495, is an illustration.

It follows that construing the statute according to its letter the Depot Quartermaster's order of December 10, 1918, and the Food Administration's allotment order of December 3, 1918, fall clearly within it.

Under a literal construction, however, the statute would make compliance with every order for supplies placed by an executive department in time of war or when war is imminent obligatory, and refusal to comply a crime, regardless of whether the person or firm receiving such an order had notice that it was intended that compliance should be obligatory.

It may be said that this could not have been the intention of Congress, particularly since § 120 itself states that the method of purchase or procurement therein authorized is *in addition* to the present methods.

We must consider, therefore, whether the statute can be construed so as to avoid this result.

It is avoided by taking the first paragraph just as it stands—as a provision complete in itself, authorizing an additional method of purchase or procurement in time of war or when war is imminent by merely placing an order, without limitation as to form or manner of procedure; and by construing the second paragraph as making compliance with such an order obligatory only when the Government indicates an intention to that effect—in other words, as implying notice of some sort to the contractor when the Government intends compliance to be compulsory, leaving acceptance to be voluntary in other cases.

So construed the section provides, in time of war or when war is imminent, not only a new method of procurement by *compulsory order or requisition*, but a new method of *purchase* as well, free of time-consuming restrictions.

That this was the intention of Congress—to provide in time of war or when war is imminent for an additional and

more suitable method of *purchase*, as well as for compulsory orders—seems apparent from a subsequent provision of the same section, which, under certain conditions, authorizes the taking over of plants, "in addition to the present authorized methods of *purchase* or procurement *herein* provided for."

The War Department during the whole period of the War adopted and acted upon this construction of § 120. That is, in addition to the method of purchase by written contract signed by both parties, it procured its supplies in some cases by simple purchase orders signed by the purchasing officer alone, giving rise to voluntary contracts, and in other cases by orders expressly reciting that they were obligatory under § 120, according as circumstances might require.

This construction is also reflected in an opinion of the Judge Advocate General of the Army. He was asked whether the provisions of Revised Statutes, § 3744, requiring bids, offers and proposals to be filed in the Returns Office of the Interior Department, applied to "*contracts* entered into under authority of § 120 of the National Defense Act." He answered:

"The requirements of the above section of the Revised Statutes [§ 3744] are a part of the general method or system prescribed by Congress for the procurement of supplies and materials for the use of the Government which requires that they be procured after advertisement and by award to the lowest responsible bidders. Section 120 of the national defense act prescribes another method and specifies that it is 'in addition to the present authorized methods.' Under this section the mere placing of an order for the supplies or materials required is sufficient *without the execution of a formal contract therefor*. No advertising for bids in any form whatever or filing of bids is necessary. *It is clearly the purpose of Congress under this section to suspend during the time*

of war or the imminence thereof the existing general Government system for the procurement of supplies and materials in so far as such suspension may be considered necessary by the heads of the departments of the Government for the expeditious and efficient conduct of Government business. I do not think, therefore, that the provisions of section 3744 of the Revised Statutes and paragraph 563 of the Army Regulations which prescribes the manner of compliance with the requirements of the said section can properly be held to extend to such bids or offers as may be received by the War Department in connection with placing orders *or entering into contracts* under section 120 of the national defense act and to require them to be filed in the returns office of the Interior Department." (Op. J. A. G. 1917, Vol. 1, pp. 141-142.) [Italics ours.]

The Court of Claims has also held that § 120 provides for an additional method of *purchase*, by placing an order giving rise to a voluntary contract, as well as for compulsory orders. (*Federal Sugar Refining Co. v. United States*, decided January 19, 1925; *Consolidation Coal Co. v. United States*, decided January 26, 1925; *R. J. Reynolds Tob. Co. v. United States*, decided Feb. 9, 1925.)

Under this construction the order in the present case was authorized by § 120 as a method of *purchase* "in addition to the present authorized methods of purchase or procurement," regardless of whether compliance with the order was made compulsory upon Swift & Company by the Government's indicating an intention to that effect.

The Government made abundantly clear, however, that it intended compliance to be compulsory.

1. At the conference of November 9, 1918, called for the purpose of informing the packers of the requirements of the Army for bacon and canned meats for the first quarter of

1919, to fill which the order in question along with similar orders to other packers was issued (Finding XVI, Rec. 36), the Depot Quartermaster made it clear that Swift & Company and the other packers represented had no choice but to comply. We quote from the minutes: "You are invited here today in order that we may make known to you our wants and needs for January, February and March, 1919, in the way of bacon and canned meats. Our requirements in order to be safe for these three months and to have a slight surplus to take care of increased calls are, etc." "We would like a letter from each of you, stating what you will be able to take care of, etc." "Your offer will be made on the basis of your limit of capacity." "I have a tabulated statement here which shows the greatest possible production that each plant can give, considering the various-sized cans and meeting our requirements for one-pound canned meats, and I want the limit of that production, etc." "You *must not* accept any more Allied contracts." "I want you to push your production as much as possible." (Decs. War Dept. Bd. Cont. Adj., Vol. 4, pp. 556, 561-564.) Referring to this conference the opinion of the Secretary of War in this case states: "The representatives of the War Department stated to representatives of the packers what the needs of the Army would be for several kinds of cured and packed meats for the months of January, February and March, 1919. Major Skiles used *language of determination and authority* in saying that he proposed to have those needs satisfied, and that he wanted the full capacity of the packers devoted to that satisfaction." (Decs. App. Sec. War Dept., Cl. Bd., Vol. 7, pp. 167, 168.) [Italics ours.]

2. The allotment order of the Food Administration was itself framed in "language of determination and authority": "On *requisition* of the Packing-house Products Branch, Subsistence Division, Office of the Quartermaster General

* * * you are allotted for delivery, etc." "Price to be determined later." "To be signed and returned to the Meat Division." (Finding XVI, Rec. 38.) The Manual of the Quartermaster Corps, § 2225, says: "A requisition is an authoritative demand or request for necessities." In *Buffalo Iron Furnace Company v. United States Shipping Board Emergency Fleet Corporation*, 291 Fed. 23, C. C. A. 2d, it was held that language much less peremptory than this, in an order placed by the Shipping Board, was "the language of command." The Court said: "The language of the order dated June 11, 1918 and of the letter dated June 12, 1918 is not one of request, but rather of command, for the expression is 'kindly acknowledge promptly the receipt and acceptance of this order'." (P. 27.)

3. Especially does it become apparent that this order could only have been intended and understood as a command when we consider that it was for an essential article of food for the Army in the field—an article of food in which there was a shortage (Finding XV, Rec. 35); and that Swift & Company and the other large packers were practically the sole source of supply (Finding IX, Rec. 32; Op., Sec. of War, Dees., App. Sec., War Dept. Cl. Bd., Vol. 7, p. 167), and were being incessantly urged to produce to the limit of their capacity, and in order that it might be known whether they were doing so, were required to disclose the capacity of their plants to the Depot Quartermaster. (Finding XI, Rec. 33.)

4. The Food Administration had and was exercising broad powers of control over the packing industry for the purposes of the War. (Act Aug. 10, 1917, 40 Stat. 276; Executive Order, Aug. 10, 1917, Finding XII, Rec. 33.) From and after November 2, 1917, and at the time of the issuance of this order, Swift & Company was conducting its

business under a license from the Food Administration, which was revocable for failure to comply with regulations. (Finding XII, Rec. 33.)

5. On February 19, 1918, the President wrote the Food Administration—"There is pressing need of the full co-operation of the packing trade, of every officer and employee, in the work of hurrying provisions abroad. *Let the packers understand that* they are engaged in a war service in which *they must take orders* and act together under the direction of the Food Administration if the Food Administration requires." (Finding XIV, Rec. 35.) [Italics ours.] This letter was communicated to the packers. (Finding XIV, Rec. 35.) It was sufficient without more to put the packers on notice that they *must* comply with orders of the Food Administration relative to the food supply of the Army—that they had no choice.¹

¹ It appears that the packers feared that if they complied with some of the orders of the Food Administration in connection with purchases for the armies of our Allies they would be violating a law of the United States—the Sherman Law. To overcome their hesitancy and to enforce compliance was the occasion for issuing this Presidential command. (Finding XIV, Rec. 35.)

It must be conceded, therefore, that the President's letter was no mere general exhortation to do good works but was specifically intended to give compulsory effect to orders of the Food Administration. The only question is whether its application was limited to the particular situation which was the occasion for issuing it. To that the language of the letter answers no—"Let the packers understand that *they are engaged in a War service in which they must take orders* and act together under the direction of the Food Administration if the Food Administration requires." What words could have been selected of any broader application. Surely, supplying our own Army with meats was no less a War service than supplying the armies of the Allies. If the packers had subsequently hesitated about complying with directions of the Food Administration for some other reason than that stated in the particular case, does anybody suppose that the Food Administration would have thought it necessary to go back to the President for another letter

3. Finally, the whole allotment system of procurement which was such an essential part of the war machinery, rested upon the theory that producers to whom orders were allotted would have no choice but to comply therewith to the extent of their facilities. The main reason for adopting the plan of allotting orders in the case of any particular commodity was shortage of supply. (Finding XIII, Rec. 34.) In such case, under a voluntary plan of procurement, the buyers would compete for the short supply and the sellers could exact any price they chose. To prevent just that thing was the chief purpose of the allotment plan, as set forth in the Food Administrator's memorandum of November 17, 1917, to the Secretary of War and the Secretary of the Navy, which they approved. (Finding XIII, Rec. 34.)

in view of the sweeping command contained in the one he had already written.

Almost every general order can be traced back to a particular case. The important thing is that, whatever gave rise to the issuance of the President's command, the command itself was not limited to any particular case or class of cases but was of general application.

Nor did the Food Administration consider that it was limited to the particular case which was the occasion for issuing it. Mr. Glasgow, Chief Counsel of the Food Administration, in his statement to the House Committee on Interstate and Foreign Commerce on the relations of the Food Administration with the Meat Packing Industry, read into the record the President's letter of February 19, 1918, embodying the command, and then said: "We issued that to the packers, and I think I would feel unfair if I did not say, sirs, that under very great difficulties of transportation and labor—though I have nothing to say or any interest in the packers' previous record—but during the war, since January, 1918, when I came here to Washington, when that information was given to the packers, I would feel unfair if I did not say that under serious difficulties they have performed the service, and performed it well, of getting food to our own people and the people of our allies, without which service it could not have been accomplished. So, while I have no interest whatever in the packers, I would feel a little ashamed of myself if I did not accord justice to them." (Hearings before Committee on Interstate and Foreign Commerce, H. R., 65th Cong., 3rd sess., on H. R. 13324, Jan. 31-Feb. 14, 1919, pt. 5, p. 1823.)

If, however, producers to whom orders were allotted had been free to accept or not as they chose, the plan would have amounted to nothing. Even, therefore, in the absence of any direct evidence that orders placed under the allotment system were intended to be obligatory, that would be a necessary implication from the very nature and object of the system.

The fact that the order of December 10 was preceded by a request to Swift & Company to submit an *offer* does not militate against the view that compliance with the order was intended to be obligatory. The substance of the transaction, not the form, is what counts. In the *Roxford Knitting Company Case*, *supra*, the orders held to be obligatory were in the form of voluntary contracts. Moreover, before an order for a definite quantity could be placed, the War Department had to know how much Swift & Company could deliver. It got that information by requesting Swift & Company to submit an offer.

2. Revised Statutes, § 3709.

The statutes requiring contracts with the War Department to be in writing and signed by the parties are likewise rendered inapplicable to the present case by Revised Statutes, § 3709, which was § 10 of the Act of March 2, 1861 (12 Stat. 220), reading as follows:

"All purchases and contracts for supplies or services, in any of the departments of the government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by

open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."
 [Italics ours.]

On April 12, 1917, the Secretary of War issued a general order declaring,

"that an emergency exists within the meaning of Section 3709, Revised Statutes, and other statutes which except cases of emergency from the requirement that contracts for and on behalf of the Government shall only be made after advertising, as to all contracts under the War Department for the supply of the War Department and the supply and equipment of the Army * * *." (Finding III, Rec. 27.)

On March 20, 1919, the emergency was declared at an end. (Purchase & Storage Notice No. 105, War Dept., Purchase, Storage & Traffic Division, Office of Director of Purchase & Storage, Washington, March 20, 1919.)

The order in the present case was placed with Swift & Company by the Food Administration on December 3, 1918, and repeated by the Depot Quartermaster on December 10, 1918. While an armistice had shortly before been declared, peace had not been. Our Armies were still in the field in undiminished numbers and their food requirements were still urgent and brooked no delay.¹

¹ At the conference of November 9, 1918, the Depot Quartermaster after stating the quantities of Army bacon and canned meats desired, said these are "our requirements, *in order to be safe* for these three months [January, February and March, 1919] and to have a *slight surplus* to take care of increased calls." (Dees. War Dept., Bd. Cont. Adj., Vol. 4, pp. 556, 561.) And in his letter to the Food Administration of November 26, 1918, requesting that orders be allotted to the various packers for the quantities stated, he asked "that pack-

In *American Smelting & Refining Co. v. United States*, 259 U. S. 75, 66 L. ed. 833, this Court, referring to § 3709, held, "There can be no question that the War created a public exigency; * * *." (P. 78.)

It is beyond question, therefore, that a public exigency existed at the time the present contract was entered into. But in addition to that, in order to come within the authority conferred by § 3709 to procure articles or services "by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals," the contract must be one for immediate delivery or performance, i. e., as immediate as the subject-matter will permit.

The present contract was for a special product to be manufactured according to specifications. It was entered into early in December, 1918, and called for deliveries beginning in January, 1919, and extending through March, 1919. As it required about fifty days to produce the article performance had to begin at once and did begin at once.

The Court held in the *American Smelting & Refining Company Case, supra*, that such a contract is one for immediate delivery within the meaning of § 3709. In that case by a letter dated March 28, 1918, the Ordnance Department placed an order with the plaintiff for 30,000 metric

ers be informed at the *earliest practicable date* allotments made to them." (Finding XVI, Rec. 37-38.) General March, Chief of Staff of the Army, testifying before a Committee of the House of Representatives said, "I do not think under the most favorable conditions of taking the inventories and of stabilizing the demobilization scheme that any legitimate surplus could have been determined in these things [packing-house products among others] before February of this year [1919], because it was the latter part of January or the first of February when General Pershing cabled not to send them forward. Up to that time we continued to send them." (Hearings before Sub-Committee Number 4 of the Select Committee on Expenditures in the War Department, House of Representatives, 66th Congress, Serial 5, p. 94.)

tons of copper at a specified price, delivery to be completed on or before June 1, 1918.¹ The plaintiff was asked to signify its acceptance, which it did by a letter dated April 11. The plaintiff, which was seeking to cast aside the contract price and recover instead "just compensation" under § 120 of the National Defense Act, made the point, quoting from the opinion of the Court,

"that there was no valid contract, since *the agreement* was not made by advertising, and *was not within the exception when the public exigencies require immediate delivery.* Rev. Sts., § 3709." (259 U. S. 78.) [Italics ours.]

The Court held the contrary, saying:

"There can be no question that the War created a public exigency, and it would be going far to deny that *the contract was for a delivery as immediate as was practicable for the subject-matter.*" (259 U. S. 78.)²

The present contract may also be viewed as one for the immediate performance of services, in that the product called for had to be manufactured according to particular specifications. In *Speed's Case*, 8 Wall. 77, this Court held that a contract for manufacturing hogs furnished by the War Department into pork for the Army, the manufacture to begin

¹ The time was subsequently extended, for just how long the opinion of the Court does not state, but it does disclose that one-third of the quantity was not delivered until after July 2.

² For other cases to similar effect see *Mowry's Case*, 2 Ct. Cl. 68; *Wentworth's Case*, 5 Ct. Cl. 302; *Pacific Steam Whaling Co.'s Case*, 36 Ct. Cl. 105; *Moran Brothers Co. v. United States*, 39 Ct. Cl. 486; *Johnston v. United States*, 41 Ct. Cl. 76; *Ceballos v. United States*, 42 Ct. Cl. 318; *Baker's Case*, 3 Ct. Cl. 343; *Wilcox's Case*, 5 Ct. Cl. 386; *Cobb, Christy & Co.'s Case*, 7 Ct. Cl. 470; *Thompson's Case*, 9 Ct. Cl. 187; *Cobb's Case*, 9 Ct. Cl. 291.

at once, was a contract for immediate performance of services within the provisions of the statute.

The present contract is thus squarely within the provisions of § 3709—it was to meet a public exigency created by the War and it called for performance or delivery “as immediate as was practicable for the subject-matter.” The question remains, Does this exempt it from the requirement of being in writing and signed by the parties?

The section contains two distinct provisions. The first requires Government contracts to be made by advertising for bids “when the public exigencies do not require the immediate delivery of the articles, or performance of the service.” The second states broadly the manner in which Government contracts may be made at times of public exigency. We repeat the words:

“When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such service engaged, between individuals.”

Certainly this is broad enough to waive the requirement of a formal written contract as well as the requirement of advertising for bids.

It may be said that the meaning of this language is restricted by the context; that the two parts of the section must be read together; that since the first part relates only to the subject of advertising for bids, the exemption provided for in the second part in times of emergency must be construed as likewise limited to that subject.

It is a familiar principle, however, that the words of a statute should be allowed to have their natural meaning and not be cut down by construction unless clearly necessary in

order to avoid an irrational result or otherwise give effect to the legislative intent. Or, as more tersely stated in the maxims, "All the words of a law must have effect, rather than that part should perish by construction."

In the present case no irrational result is produced by giving full effect to each part of the section. No legislative intent requires the cutting down of the second part so as to make it operate merely as a waiver in times of emergency of the requirement as to advertising prescribed by the first part. Indeed, such a construction would practically read the second sentence out of the statute, since it was not necessary to add the second sentence in order to waive the requirement of advertising in times of emergency. The first sentence accomplished that by limiting the requirement as to advertising to occasions "when the public exigencies do not require the immediate delivery of the articles, or performance of the service." The way was thus open, without the second sentence, for Government contracts to be made without advertising for bids when the public exigencies require immediate delivery or performance.

If, therefore, the second part of the section is to be given any effect at all—and of course effect must be given to every part of a statute, if possible (*Peck v. Jenness*, 7 How. 612, 623; *Montclair Township v. Ramsdell*, 107 U. S. 147, 152; *United States v. Diamonds*, 139 Fed. 961, 963, C. C. A. 8th; *United States v. Daniels*, 279 Fed. 844, 849, C. C. A. 2d; *Magnuson v. Wagner*, 1 F. (2d) 99, 101, and cases cited)—it must be construed as a broad authorization to Government officers to make contracts in the manner usually obtaining between individuals when the public exigency requires immediate delivery or performance.

Assuming this to be the correct construction of § 3709, is it affected by § 3744 requiring contracts made by the Secretary of War, the Secretary of the Navy and the Secretary of

the Interior, or officers under them, to be reduced to writing and signed by the parties?

We maintain not. While § 3744 was the later enactment it deals with contracts in general made by the departments named. On the other hand § 3709 deals with the special case of emergency contracts. If § 3744 embraces emergency contracts and requires them to be reduced to writing and signed it repeals the authority given by § 3709 to make such contracts in the same manner as between individuals. But the Act of 1862 from which § 3744 is taken makes no mention of the Act of 1861 from which § 3709 is taken, nor any reference whatever to the subject of emergency contracts. If there was any repeal, therefore, it could only be by implication. The law, however, does not favor repeals by implication, and, especially, a general law is never held to repeal a law dealing with a special case unless its terms necessarily require that result. (*United States v. Greathouse*, 166 U. S. 601, 605; *Rodgers v. United States*, 185 U. S. 83, 87; *Washington v. Miller*, 235 U. S. 422, 428.)

A similar question affecting § 3709 was before Attorney General Olney in 21 Ops. A. G., 181. Section 96 of the Act of January 12, 1895 (28 Stat. 624), provided that "the Postmaster General shall contract for *all* envelopes, stamped or otherwise, designated for sale to the public, or for use by his own, or other Departments * * *." Notwithstanding its comprehensive language—"the Postmaster General shall contract for *all* envelopes, etc."—the Attorney General held that this provision did not take away from the other Departments of the Government the authority conferred upon them by § 3709 to contract for supplies (including envelopes) in times of emergency in the same manner as individuals. He said:

"The Departments of Government in their operation cover a wide territory, and even in the matter

of envelopes exigencies may require immediate delivery, and the public service might be seriously impaired by the necessity of a requisition upon the Postmaster General." (P. 185.)

That the provision of Revised Statutes, § 3709, authorizing Government contracts to be made in the manner usually obtaining between individuals when the public exigency requires immediate delivery or performance, was not intended to be repealed by Revised Statutes, § 3744, is further borne out by the clause of the latter section requiring the officer making and signing a contract to file a copy thereof in the Returns Office within thirty days, "together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisements he may have published inviting bids, offers and proposals for the same." It is plain from this that contracts made in the ordinary course, where bids are required to be obtained, are what § 3744 was intended to deal with, and that it was not intended to apply where, because of a public exigency, contracts are authorized to be made without advertising for bids.

This conclusion is also compelled by a consideration of the public injury that would result if such contracts were brought within the operation of § 3744. It takes time to reduce contracts to writing, have them approved by this, that or the other officer, and finally signed by the parties. In the confusion and stress of war the time required would be greater still. If, therefore, the formalities prescribed by § 3744 had to be gone through with in emergencies, particularly in emergencies arising during war, there would be times when the arm of the Government would be paralyzed by delay when the public safety demanded the utmost speed. For this further reason, then, it must be that the requirements of § 3744 were addressed, as the Court of Claims said

in *Cobb, Christy & Co.'s Case*, 7 Ct. Cl. 470, 480, "to the ordinary business of the departments specified."

The fact that the Act from which § 3744 was taken was passed during the Civil War does not militate against this view. We are not maintaining, of course, that the mere fact that a contract is made in war-time makes it an emergency contract. In war-time as well as at other times it must appear that immediate delivery or performance, i. e., a delivery as immediate as is practicable for the subject matter, is required by a public exigency. That has been shown here. (*Ante*, 97.)

The question whether an emergency contract under § 3709 is subject to the requirements of § 3744 does not appear to have been decided or discussed by this Court. In the Court of Claims, while there has been some variation of opinion, the main course of decision has been, as will be seen from a review of the cases in Appendix B (*post*, 172), that emergency contracts within the provisions of § 3709 and similar statutes are not subject to the requirements of § 3744. In the present case, while not deciding the question because judgment had already been based on another ground, the Court of Claims said that, "it is difficult to find application for the language of the last half of the section [§ 3709] if it does not set up a rule for itself, without the restrictions of and unaffected by § 3744." (Rec. 77.)

POINT VI.

The dealings between the United States and Swift & Company prior to November 12, 1918, constituted an agreement for Swift & Company's capacity production of Army bacon, subject to the right of the United States by due notice to stop production or reduce the quantity, which agreement is enforceable against the United States under the Dent Act.

There is still another ground on which the judgment of the Court of Claims can rest.

The Dent Act gave binding effect to agreements, express or implied in fact, for war supplies or services, entered into by officers acting under the authority of the Secretary of War or the President, and partly performed prior to November 12, 1918, but which were unenforceable against the United States because not executed in the manner prescribed by law. The text of the material part of the Act is set forth in the margin below.¹

¹ "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction or instruction, or that of the President, with any person, firm or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition, or control of equipment, materials or supplies, or for services or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agree-

The petition alleged in a separate count an agreement within the purview of this Act, entered into in or about April, 1918, by which the United States, acting through the Depot Quartermaster at Chicago, undertook to take Swift & Company's capacity production of Army bacon in quantities and at prices to be fixed from time to time, and Swift & Company undertook to deliver its capacity production, subject to the right of the United States by due notice to reduce the quantity or stop production altogether. (Pet., Pars. 1-13, Rec. 1-6.)

While agreements by the Government to take capacity production are unusual in peace-time they were common during the War. This Court remarked upon that fact in a recent case,¹ and a number of such agreements will be found in the

ment has not been executed in the manner prescribed by law: *Provided*, That in no case shall any award either by the Secretary of War, or the Court of Claims include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: *Provided further*, That this Act shall not authorize payment to be made of any claim not presented before June thirtieth nineteen hundred and nineteen: * * *

"Sec. 2. That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said Section in the event that such individual, firm, company or corporation shall not be willing to accept the adjustment, payment or compensation offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said Section." (40 Stat. 1272-1273).

¹ "The Government took over during the War railroads, steel mills, shipyards, telephone and telegraph lines, the *capacity output of factories*, and other producing activities." (*Omnia Commercial Co. v. United States*, 261 U. S. 502, 513.) [Italics ours.]

reported cases in which the War Department has granted relief under the Dent Act.¹

The findings of the Court of Claims support this allegation.² (Finding XI, Rec. 33.) Specifically they show that by the latter part of 1917 "the necessity for a constant and ever increasing flow of supplies of this character made necessary the resort to other purchase and procurement methods," i. e., other than the usual peace-time methods (Finding IX, Rec. 31); that the Depot Quartermaster at Chicago "was informed from time to time by the proper authorities at Washington as to the number of men which would be in the service within stated times, and the duty devolved on the Depot Quartermaster of procuring supplies of the kind in question sufficient for the indicated number of men without the issuance of specific authorization to him in each instance or specific instructions as to quantities to be purchased" (Rec. 31-32); that "the needs for bacon and other meat products rapidly grew as the number of men to be provided for increased, and early in 1918 it became apparent that capacity production on the part of the plaintiff and the other large packers [known in the record as the seven large packers]

¹ For example see Case No. 582, *Claim of Sawyer Tanning Co.*, Decs. War Dept. Bd. Cont. Adj., Vol. II, p. 382; Case No. 1601, *Claim of the Susquehanna Webbing Co.*, Decs. War Dept. Bd. Cont. Adj., Vol. III, p. 629; Case No. 502, *Claim of National Vaccine & Antitoxin Institute*, Decs. War Dept. Bd. Cont. Adj., Vol. IV, p. 277; Case No. 413, *Claim of Casco Tanning Co.*, Decs. War Dept. Bd. Cont. Adj., Vol. V, p. 79; Case No. 492, *Claim of J. Lichtman & Son, et al.*, Decs. War Dept. Bd. Cont. Adj., Vol. V, p. 221; Case No. 1878, *Claim of American Sponging Co.*, Decs. War Dept. Bd. Cont. Adj., Vol. V, p. 387.

² It is due the War Department Board of Contract Adjustment to say that in holding the evidence insufficient to establish such an agreement, it did not have before it some of the most important evidence subsequently introduced when the case was before the Court of Claims; e. g., the testimony of General Kniskern, Depot Quartermaster at Chicago, who proposed and entered into the agreement on the part of the Government.

would be required" (Finding XI, Rec. 33); that accordingly "they were informed [by the Depot Quartermaster] at one of the conferences held that they would be expected to produce to capacity, a statement which was frequently repeated, *and it was understood that the Army would need and would take capacity production until further notice*" (Finding XI, Rec. 33); that "a survey was made of the packing plants to determine their capacity in order that it might be known whether they were producing to capacity" (Finding XI, Rec. 33); that from this time on until notified to put no more in cure, Swift & Company produced Army bacon to the limit of its capacity, and the Government received and paid for all that it produced during the remainder of 1918 (Finding XI, Rec. 33). [Italics ours.] Notice to put no more bacon in cure was received January 27, 1919, and at once complied with. (Finding XVIII, Rec. 40-41.)

This is more than enough to bring the case within the Dent Act. It would have been sufficient had there been no *express* understanding or agreement at all, but only the Depot Quartermaster's request to Swift & Company to produce and deliver Army bacon to the extent of its capacity until further notice, and Swift & Company's compliance therewith, both sides expecting compensation to be made, since that would have given rise to an *implied* agreement under the Dent Act.

This would appear to be settled by what this Court said in *Baltimore & Ohio R. R. Co. v. United States*, 261 U. S. 592. That was a suit under the Dent Act to recover compensation for constructing barracks for the use of United States troops at Locust Point, Maryland. The theory of the case was that Colonel Kimball, Expeditionary Quartermaster at Locust Point, requested the construction of the barracks, and that out of that request arose an implied agreement for compensation within the meaning of the Dent Act. It was found as a fact that Colonel Kimball did *not* make any such request,

but on the contrary the construction was "voluntarily undertaken by the company, without saying anything whatever about compensation, apparently from its own desire to provide for the comfort of troops who were guarding *its property* as well as that of the Government." Accordingly relief was denied. The decision clearly indicates, however, what *does* as well as what does not give rise to an implied agreement under the Act. It states:

"It does not appear from the findings that Col. Kimball requested the construction of the barracks; that the company intimated that it would expect payment from the Government or that Col. Kimball suggested that such payment would be made; or that the company in fact expected compensation." (P. 599.)

The inference is clear that if Colonel Kimball had had the necessary authority, and had requested the company to construct the barracks, and both parties had expected compensation to be made, the Court would have considered the case to be within the operation of the Act.

Likewise the War Department—the department of the Government specially charged with the administration of the Dent Act—has held in a long line of cases, that where a duly authorized officer requested the performance of work or services and the person to whom the request was addressed entered upon performance prior to November 12, 1918, an implied agreement arose, within the meaning of the Dent Act, to make compensation on the basis of costs incurred plus a reasonable remuneration.¹

¹ The cases holding that a *specific* request to a *particular* manufacturer or group to produce an article in a stated quantity or to the limit of its or their capacity gives rise to an implied agreement under the Dent Act for reimbursement are to be distinguished of course from those in which there was only a general exhortation or urging to increase production.

A typical case of this class is *Claim of Susquehanna Webbing Co.*, Dees. War Dept. Bd. Cont. Adj., Vol. III, p. 629. Early in 1918 the claimant had been requested to keep up continuous capacity production of webbing for the Army (p. 631), and from time to time orders for specific quantities were placed with it. (Pp. 629-630.) On November 5, 1918, it was tendered an order for 300,000 yards, which it accepted on November 12. (Pp. 630-631.) On November 14 it was notified to stop production (p. 630), but in the meantime and prior to November 12 it had incurred expenditures for which it claimed reimbursement. Since the Dent Act only applies to agreements made prior to November 12, 1918, no relief could be granted unless, as the opinion of the War Department states, "there is some further element in the situation which placed the claimant under obligation to proceed before November 12, 1918, * * *." (P. 631.) It was held that this further element existed in that long prior to November 12 an agreement within the meaning of the Dent Act was created by the request made upon the claimant for continuous capacity production and the claimant's compliance therewith. (Pp. 631-632.) The decision is thus stated in the headnote:

"Where it was understood between the contractor and the Government that production was to be continuous, and that the Government would take all the goods the contractor could produce, the latter is justified in proceeding without waiting for the formal contract." (P. 629.)

Other similar cases are cited below¹ and digested in Appendix C. (*Post*, 178.)

¹ Case No. 598, *Claim of Sawyer Tanning Co.*, Dees. War Dept. Bd. Cont. Adj., Vol. II, p. 382; Case No. 1560, *Claim of Briggs & Stratton Co.*, Dees. War Dept. Bd. Cont. Adj., Vol. II, p. 789; Case No. 1764, *Claim of C. H. Cowdrey Machine Works*, Dees. War Dept. Bd. Cont.

Any other construction would have defeated the purpose of the Act. To aid in ascertaining the purpose of a remedial statute, especially where the language, as in the case of the term "implied agreement," is susceptible of more than one meaning, reference may be had to the conditions which led to its enactment, particularly the mischief it was intended to correct, as shown by the proceedings of the legislative body and other public documents. (*Church of the Holy Trinity v. United States*, 143 U. S. 457, 462-465; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 19; *Stafford v. Wallace*, 258 U. S. 495, 512-513.) In *Stafford v. Wallace*, the Court in interpreting the "Packers and Stockyards Act of 1921," the constitutionality of which was in question, took into full account the conditions which gave rise to the legislation as set forth in the reports of the committees of Congress and other public documents, saying:

"It is helpful for us in interpreting the effect and scope of the Act in order to determine its validity to

Adj., Vol. III, p. 135; Case No. 1601, *Claim of Susquehanna Webbing Co.*, Decls. War Dept. Bd. Cont. Adj., Vol. III, p. 629; Case No. 502, *Claim of National Vaccine and Antitoxin Institute*, Decls. War Dept Bd. Cont. Adj., Vol. IV, p. 277; Case No. 413, *Claim of Casco Tanning Co.*, Decls. War Dept. Bd. Cont. Adj., Vol. V, p. 79; Case No. 492, *Claim of J. Lichtman & Son*, Decls. War Dept. Bd. Cont. Adj., Vol. V, p. 221; Case No. 642, *Claim of Foster & Stewart Co.*, Decls. War Dept. Bd. Cont. Adj., Vol. V, p. 272; Case No. 1878, *Claim of American Sponging Co.*, Decls. War Dept. Bd. Cont. Adj., Vol. V, p. 387; Case No. 1094, *Claim of Harriman Industrial Corporation*, Decls. War Dept. Bd. Cont. Adj., Vol. V, p. 463; Case No. 2213, *Claim of Langrock Brothers & Co.*, Decls. War Dept. Bd. Cont. Adj., Vol. V, p. 688; Case No. 43, *Claim of Burdette Manufacturing Co.*, Decls. War Dept. Bd. Cont. Adj., Vol. VI, p. 317; Case No. 710, *Claim of A. Ziegler & Sons Co.*, Decls. War Dept. Bd. Cont. Adj., Vol. VI, p. 742; Case No. 2852, *Claim of W. D. Ham*, Decls. App. Sec. War Dept. Cl. Bd., Vol. VII, p. 556; Case No. 2220, *Claim of Sager & Sloteroff*, Decls. App. Sec. War Dept. Cl. Bd., Vol. VII, p. 649; Case No. 194, *Claim of Alcohol Products Co.*, Decls. App. Sec. War Dept. Cl. Bd., Vol. VIII, p. 114; Case No. 1779, *Claim of Pfau Manufacturing Co.*, Decls. App. Sec. War Dept. Cl. Bd., Vol. VIII, p. 213.

know the conditions under which Congress acted." (P. 513.)

Especially valuable as guides to the intention of Congress in such cases are the reports of the committees in charge of the legislation. (*Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 333; *Northern Pacific R. Co. v. State of Washington*, 222 U. S. 370, 380; *McLean v. United States*, 226 U. S. 374; *Cramp v. International, etc., Co.*, 246 U. S. 28, 37, 41; *United States v. St. Paul, etc., R. Co.*, 247 U. S. 310.)

In *Oceanic Steam Navigation Co. v. Stranahan*, this Court, speaking through Chief Justice White, said:

"While we have said that the conclusions just stated are clearly sustained by the text, yet, if ambiguity be conceded, it is dispelled and the same result is reached by a consideration of the report of the Senate Committee on Immigration, where the provisions originated, and which we have a right to consider as a guide to its true interpretation." (P. 333.)

The Dent Act originated in the Committee on Military Affairs, which had charge of the bill in the House of Representatives. (Rep. No. 877, 65th Cong., 3rd Sess.) Looking at the report of that Committee, we find a clear and authoritative statement of the scope and purpose of the legislation. The report divides into four classes the cases intended to be covered by the bill. The fourth class is described as follows:

"In a considerable number of cases, while negotiations were still under way and before definite terms had been arrived at as to price or quantity, suppliers have been requested by the department to proceed to prepare for and to enter upon the execution of work for the department in advance of any final agreement upon the terms upon which they were to be remunerated, and so necessarily in advance of the reduction of

the agreement to the form required by statute. Yielding to the exigencies of the war situation, *such contractors put the work of production ahead of the work of negotiation* and have often put themselves in a position where their only reliance was the good faith and fairness of the Government in finally fixing the terms of the agreement." [Italics ours.]

The report then proceeds as follows:

"Under all the foregoing classes of cases the contractors have, at the request of the United States, and in response to the needs of the war emergency, made expenditures and incurred obligations in preparing, or actually entering upon, the task of supplying the war needs of the country. They have a part, and in many cases an essential part, of their working capital tied up in the expenditures they have made in preparing to begin work, in the creation of facilities, in actual materials purchased, wages paid to labor employed, or in work in process. In order that this working capital may be returned to them so that they may as speedily as possible go into commercial work, it is essential that there be a prompt adjustment under these informal or *implied agreements*. * * * Nor should the patriotism be penalized of those who in the exigencies of the war have gone ahead to produce instead of waiting to bargain. It is true that such persons have nothing to rely on except the good faith of the United States, but surely there should be no more solid ground for reliance than that good faith." [Italics ours.]

Construing the Act in the light of this statement of its purpose, as under the authorities we must, the term "implied agreement" thus includes cases where, prior to November 12, 1918, contractors, at the request of the United States and in response to the needs of the war emergency, entered upon the

execution of work while negotiations were still under way and before definite terms had been arrived at as to price or quantity.

This is not a new conception of an implied in fact contract. Indeed, the most familiar example of an implied in fact contract is that which arises where work is requested under such circumstances that a reasonable person would infer an intent to pay for it. (1 Williston on Contracts, § 36, p. 54.) The only thing new is that the Dent Act gives a right of recovery against the United States for expenses incurred in performing or preparing to perform such a contract, together with a reasonable remuneration, whereas otherwise it might be that all that could be recovered would be the value of what was actually received by the United States.

In the present case, as we have seen, there was not only such a request with expectation of payment, resulting in an implied in fact agreement, but there was also an express agreement for Swift & Company's continuous capacity production of Army bacon until further notice. (*Ante*, 107.)

While finding as stated (*ante*, 107), that an understanding or agreement was entered into for Swift & Company's capacity production of Army bacon, the Court of Claims expressed the opinion that the fact that the parties subsequently from time to time by offer and acceptance entered into contracts for *specific* quantities showed that they were not acting under the agreement for capacity production (Op., Rec. 77-78.)

This conclusion—note that it is not a finding of fact—loses sight of the true relation between the agreement for continuous capacity production and the subsequent contracts for specific quantities. After the former had been made it was still necessary to have some procedure for determining the exact quantities to be delivered from time to time, and this

was the function of the subsequent contracts. They did not supersede the agreement for continuous capacity production but supplemented it.

This very point arose in the *Claim of Carlisle Commission Co.*, decided October 25, 1920, Decs. War Dept. Bd. Cont. Adj., Vol. VII, p. 1011. The claimant there was the largest dealer in forage in the United States. As in the case of so many other articles, the Government found it impracticable during the War to purchase forage by the peace-time method of advertising for bids. (P. 1013.) The claimant entered into an oral agreement with officers of the Quartermaster Corps, at their solicitation, to supply the War Department with all the hay and straw that claimant could get hold of, "at prices to be agreed upon from time to time, to be shipped in such quantities and to such camps as might be designated by the Government by letters of acceptance or purchase orders." (P. 1022.) The specific quantities to be delivered from time to time under the oral agreement were determined by "bids" submitted by the claimant and "letters of acceptance" from the War Department, followed by purchase orders. (P. 1015.) A claim was filed under the Dent Act based on the oral agreement and the question was, "Whether there was such a merger of the original informal agreement in the written letters of acceptance and purchase orders as to supersede the original informal agreement." (P. 1024.) The War Department Board of Contract Adjustment held no, saying:

"These letters of acceptance and the purchase orders were merely supplementary to the larger basic informal contract * * *." (P. 1015.)

The Government argues that no recovery under the Dent Act can be had with respect to the bacon prepared for delivery in March, 1919, because its production was not com-

menced nor any obligations incurred in that behalf prior to November 12, 1918. This would be so, of course, by the plain terms of the Act, if Swift & Company were suing upon an agreement covering the March delivery alone. But there was no separate agreement for the March delivery. As we have seen, there was one basic agreement for continuous capacity production until further notice, to be delivered in instalments as determined upon from time to time (*ante*, 107), and a supplementary agreement covering requirements for the first three months of 1919, to be delivered in monthly instalments. (*Ante*, 115.) It is undisputed that performance of each of these agreements commenced prior to November 12, 1918. (Finding XI, Rec. 33; Finding XVII, Rec. 40.) A contract for a stated quantity of product to be delivered in instalments, monthly or otherwise, is a single contract, and not divisible into separate contracts for each separate instalment. (*Norrington v. Wright*, 115 U. S. 188, 203-204; *Vulcan Trading Corp. v. Kokomo Steel & Wire Co.*, 268 Fed. 913, C. C. A. 6th. See also *ante*, 84.) There being thus no separate agreement for the March instalment, it was unnecessary to show that any expenditures were made or obligations undertaken on account of that instalment prior to November 12, 1918.

The Government also contended below that any understanding or agreement made in April, 1918, for Swift & Company's capacity production of Army bacon until further notice would be in conflict with Revised Statutes, § 3679 as amended, § 3732 and § 3735.¹

Sections 3679 and 3732 are *in pari materia*, and read together prohibit the making of any contract on behalf of the

¹ These provisions read as follows:

Revised Statutes § 3679 as amended, Comp. Stat., 1918, § 6778: "No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in

United States where there is no appropriation adequate to its fulfillment, or that would involve the Government in any obligation for the payment of money in excess of the appropriations for the current fiscal year, unless such contract is authorized by law.

The agreement here in question *was* authorized by law, and therefore falls within the excepted class.

Revised Statutes, § 1133, provides:

"It shall be the duty of the officers of the Quartermaster's Department, under the direction of the Secretary of War, to purchase and distribute to the Army all military stores and supplies requisite for its use which other corps are not directed by law to provide:
 * * *"

This is a more explicit authorization than is required since this Court has stated that a contract "is authorized by law" within the meaning of the statute where authority to make it was granted "either expressly or by necessary implication." (*Chase v. United States*, 155 U. S. 480, 502.) [Italics ours.]

But in any event the agreement did not call for payments in excess of the available appropriations.

excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. * * *"

Revised Statutes, § 3732, Comp. Stat., 1918, § 6884: "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

Revised Statutes, § 3735, Comp. Stat., 1918, § 6888: "It shall not be lawful for any of the Executive Departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made."

The Act of May 12, 1917, appropriated \$18,500,000 for the purchase of subsistence supplies for the Army during the fiscal year ending June 30, 1918 (40 Stat. 40, 50-51); and the Act of October 6, 1917, appropriated \$250,000,000 more for the same purpose (40 Stat. 345, 357-358). In addition, the Act of April 11, 1917 (40 Stat. 28), appropriated \$100,000,000 "For the national security and defense, and for each and every purpose connected therewith, to be expended at the discretion of the President," and to be available until June 30, 1918 (Act December 15, 1917, 40 Stat. 429).

No attempt was made to show that these appropriations were inadequate to the fulfillment of the agreement in question, or that the agreement imposed obligations upon the Government in excess of such appropriations; nor even that the unexpended balance thereof at the time the agreement was made was inadequate to its fulfillment, though that would have made no difference since contractors are not bound to know the condition of a *general* appropriation at any given time. (*Dougherty v. United States*, 18 Ct. Cl. 496, 503; *Meyerle v. United States*, 33 Ct. Cl. 1, 25.)

It may be said, however, that the agreement *might* have involved the Government in obligations in excess of these appropriations because it had no fixed period of duration.

That contingency was foreclosed by the reservation of the right on the part of the Government to terminate the agreement upon notice, which put it within the power of the officers of the Government at all times to keep the obligations incurred under the agreement within the limits of the available appropriations.

It makes no difference that the agreement was not terminated until some time in the fiscal year following that in which it was made, *first*, because the statute does not prohibit contracts the performance of which may extend beyond the current fiscal year but only contracts creating obligations in

excess of the appropriations for the current fiscal year; and, *secondly*, because even had it appeared (as it does not) that the appropriations under which the agreement was made became exhausted at the end of the current fiscal year, still, as held in *M'Collum v. United States*, 17 Ct. Cl. 92, 104, continued performance of the agreement during the succeeding fiscal year constituted a renewal or ratification of it and brought it under the appropriation for *that* year.

Furthermore, a mere possibility that the Government might become involved in obligations in excess of the appropriations would not bring the agreement within the prohibited class. Compare the cases under the Statute of Frauds holding that although the parties to an agreement may expect it to continue in force longer than a year and although it did in fact continue in force longer than a year, yet if under its terms it *could* have been performed within a year, it does not fall within the description of agreements "not to be performed within the space of one year from the making thereof." (*Warner v. Texas & Pacific R. R. Co.*, 164 U. S. 418, 420, and cases cited.)

With respect to Revised Statutes, § 3735, prohibiting contracts "for stationery or other supplies for a longer term than one year from the time the contract is made," the first answer is that an agreement subject to termination upon notice is not an agreement "for a longer term than one year."¹ Secondly, the utmost effect of this section would be to read the one year limitation into the agreement, making it expire not later than April, 1919. All the bacon in controversy had been produced and tendered, however, prior to that date. Finally, it is at least arguable, under a familiar rule of statutory construction, that this provision applies only to stationery and other supplies of the *same kind or class*, and, therefore, does not apply to food supplies for the Army.

¹ See the cases under the Statute of Frauds just referred to.

POINT VII.

The finding of the Court of Claims that General Kniskern, Depot Quartermaster and Zone Supply Officer at Chicago, who entered into this contract on behalf of the United States, had full authority to make contracts for meat supplies for the Army, is not reviewable and is right in any event.

The Court of Claims found:

"General Kniskern, as depot quartermaster at Chicago, was the authorized representative of the Acting Quartermaster General in the purchase of meat supplies and, while subject to any specific instructions which the Acting Quartermaster General might see fit to give him, his duty was to supply the needs, and specific authority as to each purchase was not required." (Finding VII, Rec. 30.)

The Government contends that this was error. (Government's Brief, p. 61.)¹

I. The finding is not reviewable.

This is a finding of ultimate fact and therefore conclusive. The question of authority in connection with Govern-

¹ In discussing the question the Government refers freely to several orders and notices, not incorporated in the findings, in the nature of instructions from the heads of departments or bureaus to subordinates. While, from the standpoint of judicial notice being taken of them, we do not think that instructions to subordinates stand on the same footing as *regulations* addressed to the public generally, pursuant to law, by a head of department, we make no objection on that ground, asking only that it be kept in mind that the *letter* of such instructions is not always enforced in *practice*, especially in periods of stress, and that the Court below expressly found that the instructions relating generally to the purchase of supplies for the Army were not treated as applicable to the purchase of meat supplies, the latter being the subject of special orders. (Finding VII, Rec. 29-30.)

ment contracts has a double aspect, depending upon the circumstances of the particular case. Where the question is whether there is any provision of law authorizing anybody at all, even the head of a department or bureau, to make the particular contract, as in *Floyd's Acceptances*, 7 Wall. 666, or where the question turns upon the construction of a statute, there, of course, it is primarily a question of law. But where, as here, it is undisputed that the head of the department or bureau has authority to make the contract either directly or through a subordinate, and the only question is whether the particular subordinate assuming to act has been designated for that purpose, and if so whether he has performed his duty in accordance with the instructions of his superiors, the question is one of ultimate fact.

It is the settled practice of the Court of Claims to make findings on questions of authority of the last mentioned kind;¹ and this Court expects it to do so. Thus, in the recent case of *Baltimore & Ohio R. R. Co. v. United States*, 261 U. S. 592, the opinion states:

"Here, however, there is no *finding* that Colonel Kimball had any authority to enter into the alleged agreement; and, on the contrary, such authority is negatived by the *finding* that none of the Government officials connected with work at Locust Point had any authority to order the construction of a temporary barracks." (P. 597.) [Italics ours.]

¹ See *Morgan Engineering Co. v. United States*, 58 Ct. Cl. 373, 374; *Atlantic City R. R. Co. v. United States*, 58 Ct. Cl. 215, 218; *George F. Horton v. United States*, 57 Ct. Cl. 395, 396; *Savage Arms Corp. v. United States*, 57 Ct. Cl. 71, 75; *Wilcox v. United States*, 56 Ct. Cl. 224, 227, 230; *Broadbent Laundry Corp. v. United States*, 56 Ct. Cl. 128, 129; *Williams Eng. & Cont. Co. v. United States*, 55 Ct. Cl. 349, 351; *Yazoo & Miss. Valley R. R. Co. v. United States*, 54 Ct. Cl. 165, 168; *Martin v. United States*, 28 Ct. Cl. 137, 139; *Mott v. United States*, 9 Ct. Cl. 257, 259; *Allen v. United States*, 5 Ct. Cl. 339, 345; *Industrial Engineering Co. v. United States*, decided Feb. 16, 1925.

The Government itself on the trial treated the question of authority in this case as a question of ultimate fact and requested the Court of Claims to make a finding on it. (See Request No. VI, Government's Requests for Findings of Fact below, page 2590.) In connection with this request its brief stated:

"There is no objection to a finding of *ultimate facts* based on the rules, regulations and *practices* of the War Department, * * *." (P. 2612.) [Italics ours.]

Disappointed that the Court did not find the ultimate fact to be as claimed by it, the Government now changes front and asks to have the question treated as one of law.¹ This is exactly what was unsuccessfully attempted in *Mahan v. United States*, 14 Wall. 109, 112.

In the nature of things the question of the authority of General Kniskern to make the contract in the present case could be nothing else than a question of fact, since its determination depended not alone upon the interpretation *in the abstract* of the various orders, notices, circulars and bulletins offered in evidence on this point, but also on how they were interpreted *in practice*,² as the letter of departmental rules and instructions is frequently departed from in practice, especially during periods of emergency and stress.

But even if it were a question of mixed fact and law, which

¹At times it lapses from its new position and again treats the question as one of fact, as for example, when it says that "the *evidence* clearly shows that Capt. Shugert, and not Gen. Kniskern, was the properly authorized contracting officer * * *." (Government's Brief, p. 69.) [Italics ours.]

²The Government itself recognized this, for, as above noted, it requested a finding on the question of authority, "based on the rules, regulations and *practices* of the War Department, * * *." [Italics ours.]

is the most that can be claimed from the standpoint of the Government, the finding of the Court of Claims would still be conclusive. (*United States v. Omaha Tribe of Indians*, 253 U. S. 275, 281.)

2. The finding is right.

No different conclusion could be reached if the question were still open.

1. By Special Orders No. 94, dated April 24, 1917, the Secretary of War directed General (then Colonel) Kniskern, Quartermaster Corps, U. S. A., to "assume charge of the General Depot of the Quartermaster Corps at Chicago, Illinois." (Finding IV, Rec. 27.) He continued as Depot Quartermaster at Chicago until September 1, 1919. (Finding IV, Rec. 27.)

His authority as a purchasing officer emanated primarily from the position he held. (Op. Ct. Cl., Rec. 57.) The Manual for the Quartermaster Corps speaks continually of "a depot or purchasing quartermaster." (See, e. g., Vol. I, pp. 16-17.) His authority was also specifically delegated.

Office Order No. 491 of July 3, 1918, issued by the Acting Quartermaster General, created a Packing-house Products Branch of the Subsistence Division of the Quartermaster General's Office, "to be located in the general supply depot of the Quartermaster Corps at Chicago, * * * under the immediate direction and control of the Depot Quartermaster, and to be responsible for all matters pertaining to the procurement, production and inspection of packing-house products." (Finding V, Rec. 29.)

This order was in force at the time the contract in the present case was made and long afterward. The interpretation put upon it by the Acting Quartermaster General who issued it, as found by the Court of Claims, was that it "dele-

gated to General Kniskern the purchase of meat products and articles of that kind." (Finding V, Rec. 29.)

What interpretation the Acting Quartermaster General put upon his own order is necessarily a question of fact. The Court's finding as to that is therefore conclusive.

Besides, that is the way it was interpreted in practice. Throughout all this period General Kniskern, as Officer in Charge of the Packing-house Products Branch of the Subsistence Division of the Quartermaster General's Office, purchased enormous quantities of packing-house products with the full knowledge and acquiescence of the War Department at Washington. (Finding IX, Rec. 31-32.) As the opinion of the Court of Claims states:

"* * * for months our rapidly increasing Army was adequately supplied, both at home and abroad, with immense quantities of bacon and other meat supplies purchased by General Kniskern, delivered and paid for, and we have no intimation of a contention by any one that he was acting without full authority. An officer might make an isolated purchase without authority and without the knowledge of his superior, but these purchases furnish their own repudiation of such a contention." (Rec. 58.)

The Annual Report of the Quartermaster General for 1919 states the purpose of Office Order No. 491 of July 3, 1918, and the practice under it as follows:

"As the meat supply in the United States was steadily decreased by the unprecedented demands on it by the Army and the allied nations, it was decided that a *centralized depot of supply* could handle the meat requirements more effectively than the Washington purchasing branch. *Chicago was decided upon as the logical place for this branch, as it is the center of the packing industry in this country.* A packing-house products branch was therefore established in

Chicago and empowered to make all purchases of meat directly under the authorization of the Subsistence Division. Since its installation on July 3, 1918, this branch has handled all meat requirements for this country and overseas. (Ann. Rep., Q. M. G., 1919, p. 67.) [Italics ours.]

General Kniskern's authority was renewed and confirmed by an order issued October 28, 1918, by the Director of Purchase & Storage, who was also the Acting Quartermaster General. (Finding IV, Rec. 28.) This order divided the country into zones of supply, and made the Depot Quartermaster in each zone the *representative* of the Director of Purchase & Storage under the title of Zone Supply Officer, "with authority over and responsibility for supply activities within the zone under his jurisdiction." (Finding VI, Rec. 29.) It further provided that the zone supply officers "shall have final authority in their respective zones over all matters referred to in the existing orders and regulations." (*Ibid.*)

2. The contention that General Kniskern had no authority to make contracts for meat supplies for the Army rests on War Department General Orders No. 55, dated June 10, 1918.¹ (Government's Brief, pp. 64-65.)

¹ Paragraph No. 942, Manual for the Quartermaster Corps, and General Orders No. 47 of May 11, 1918, are also mentioned. (Government's Brief, pp. 62, 64-65.) But the former contained nothing which was not in General Orders No. 55, while the latter merely reproduced Revised Statutes, §§ 3744-3747, and directed purchasing officers to comply therewith. Section 3744 has nothing to do with the question of authority, but requires contracts with the War Department to be in writing and signed by the parties. Its bearing upon the case is discussed elsewhere. (Point III, *ante*, 31.) The other sections provide that contracting officers shall make and affix to the contract an affidavit of disinterestedness and file the contract, together with all bids, etc., in the proper office, and also direct the Secretary of War to furnish contracting officers with forms and instructions for

General Orders No. 55 provided, that "contracts will be made in the name of, and will be signed by, the officers designated by the chief of the bureau to which the contracts pertain, such appointments to be effective only after the announcement of the names, rank and contracting authority of such officers by the chief of the bureau concerned," and that "no contract will be signed by an officer whose name does not appear in the body of the contract as the contracting officer."

The contention is that General Kniskern had no authority to make contracts for the purchase of meat supplies for the Army because he was never designated as a contracting officer in the manner and form provided by these orders. (Government's Brief, p. 65.)

The answer is:

First. The findings of the Court of Claims show that the purchase of meat supplies for the Army was treated by the War Department as a *special* case and made the subject of *special* orders, and that orders and instructions relating *generally* to the purchase of supplies for the Army, such as General Orders No. 55, while making "no specific exception as to meat supplies * * * were never treated as applicable thereto;" that "the necessities during the period of the War precluded such application." (Finding VII, Rec. 29-30.)¹

this purpose. These provisions likewise have nothing to do with the question of authority. In any event they are directory only and consequently if the officers of the Government fail to comply with them the contractor "is not responsible for this neglect." (*Clark v. United States*, 95 U. S. 539, 542.)

¹ It should also be noted that by other War Department orders, namely, Notice No. 28, Office of the Quartermaster General, dated July 18, 1918, as amended by Notice No. 72 of the same office, dated August 13, 1918, and Notice No. 189 of the same office, dated October 8, 1918, it was provided that calls under Food Administration allotments, in which class the present contract falls, need *not* be signed at the end by both contracting parties or have the name of

Second. Even had General Orders No. 55 been applicable to the purchase of meat supplies, their requirements were met by the Acting Quartermaster General's Office Order No. 491 of July 3, 1918. That order, in establishing at Chicago a Packing-house Products Branch of the Subsistence Division of the Quartermaster General's Office, *under the immediate direction and control of the Depot Quartermaster at that point*, and making it responsible for all matters pertaining to the procurement, production and inspection of packing-house products (*ante*, 123), was itself a sufficient designation and announcement, "by the chief of the bureau concerned," of the Depot Quartermaster at Chicago as contracting officer for packing-house products. The further provision of General Orders No. 55 that the name of the contracting officer must be written in the body of the contract, is directory only. If it affects the rights of the other contracting party at all, certainly it affects them no

the contracting officer written in the body of the instrument. Notices Nos. 28 and 189 prescribed two forms, Q. M. C. Form 108-b, known as the standard purchase order form, and Q. M. C. Form 108-c, known as the standard contract form, and indicated when one and when the other should be used. For calls under allotment orders of the Food Administration, Q. M. C. Form 108-b, the standard purchase order form, was specified, regardless of the amount involved. Now the name of the contracting officer did *not* appear in the body of this form and it was *not* signed at the end by both contracting parties but only by one of the parties—the purchasing quartermaster.

While Notices Nos. 28, 72 and 189 were not incorporated in the findings, neither were General Orders No. 55. If the Court may take judicial notice of the one it may of the others. The particular parts of these orders material in the present connection are as follows:

"The limitation of the purchase orders, Q. M. C. Form 108-b, to twenty-five thousand dollars (\$25,000.00) shall not apply to commodities allotted to the Quartermaster Corps by the United States Food Administration." (Notice No. 72, par. 1, amending Notice No. 28, par. 15.)

"In addition, purchase orders shall be used to report calls under an allotment of the United States Food Administration or the United States Fuel Administration." (Notice 189, par. 12.)

more than the requirement of the statute itself (Revised Statutes, § 3745), that the contracting officer shall affix to the contract an affidavit of disinterestedness. Failure to comply with the last mentioned requirement, however, does not invalidate the contract. (*Clark v. United States*, 95 U. S. 539, 542.)

Third. There was never any other designation of a purchasing and contracting officer for the Packing-house Products Branch of the Subsistence Division of the Quartermaster General's Office, which is proof conclusive that either Office Order No. 491 was treated as a designation of General Kniskern in that behalf, or else that General Orders No. 55, like other orders relating generally to the purchase of supplies for the Army, were treated as not applicable to packing-house products. Otherwise, the branch of the Quartermaster General's Office which was "responsible for all matters pertaining to the procurement, production and inspection of packing-house products" (*ante*, 123), could not have functioned at this critical time for lack of an officer authorized to act for it in making contracts.

The Government attempts to escape from this dilemma by pointing to an order of the Acting Quartermaster General of September 17, 1918, designating J. C. Shugert, before the War a sergeant in the Quartermaster Corps, during the War a temporary captain in that corps, and since the War a sergeant again, "as purchasing and contracting officer for the Packing-house Products and Produce Division of the Office of the Depot Quartermaster at Chicago." (Finding VIII, Rec. 31.)

As shown, however, by the findings and the opinion of the Court of Claims (Finding VIII, Rec. 31; Op. Ct. Cl., Rec. 59-60), that order did not vest Shugert with any authority at all to make contracts for the Packing-house Products

Branch of the Subsistence Division of the Quartermaster General's Office; much less did it vest him with such authority to the exclusion of General Kniskern, officer in charge of that branch.

Before the Packing-house Products Branch of the Subsistence Division of the Quartermaster General's Office was established there was a packing-house products and produce division of the Depot Quartermaster's Office at Chicago. (Finding VIII, Rec. 31.) These two units were entirely separate and distinct. Nor was the distinction based on any mere "slight difference of description," as the Government's brief suggests. The former, as we have seen, was a unit of the Quartermaster General's Office, located at Chicago, under the immediate direction and control of the Depot Quartermaster, with general authority to purchase packing-house products for the whole Army of the United States wherever situated. (*Ante*, 123.) The latter was a unit in the Depot Quartermaster's Office at Chicago. By Depot Order No. 323 of January 8, 1919, its functions were transferred to the former, and it was abolished. (Finding VIII, Rec. 31.)

Shugert was designated as purchasing and contracting officer for the Packing-house Products and Produce Division of the Depot Quartermaster's Office only. The order of September 17, 1918, expressly so states. (Finding VIII, Rec. 31.) He was never at any time designated as purchasing and contracting officer for the Packing-house Products Branch of the Subsistence Division of the Quartermaster General's Office (or, as it became later, Office of Director of Purchase & Storage)—the agency which, as the Court of Claims found, "had jurisdiction over the purchase of packing-house products here involved, * * *."

(Finding VIII, Rec. 31.)¹ Nor was he ever connected with that branch in any capacity whatever until January 9, 1919, the day after the Packing-house Products and Produce Division of the Depot Quartermaster's Office was abolished, when he was assigned as one of the "assistants to the Officer in Charge, Packing-house Products Branch, Subsistence Division, Office of Director of Purchase & Storage." (Finding VIII, Rec. 31.)

The Government's brief seems to suggest that Captain Shugert's authority was enlarged by Notice No. 179, Office of the Quartermaster General, dated October 3, 1918, and Purchase & Storage Notice No. 109, dated December 2, 1918. (P. 66.) These notices are not incorporated in the findings, nor were they included in the departmental orders which the Government in its Motion to Remand asked to have added to the findings. Passing that, however, as appears on their face, they were nothing but lists, such as were issued from time to time, of officers who had been appointed purchasing and contracting officers. Captain Shugert's name appears in these lists. But it was the order of September 17, 1918, just considered, which appointed him a contracting officer. Whatever authority he had he got from that order. Nothing was added to his authority by including his name in the published lists of contracting officers.

The fact is that these notices show the exact contrary of what the Government claims. They show once more that

¹ The Government's brief asks, "if the Packing-house Products and Produce Division [of the Depot Quartermaster's Office] * * * did not purchase or have anything to do with the purchase of packing-house products, why did the War Department issue a futile order appointing him [Shugert] *contracting officer* in that division * * *?" (P. 68.) In the war-time stress and confusion futile orders were not an unheard of thing. But this order was not necessarily futile. *Non constat*, but that the Packing-house Products and Produce Division of the Depot Quartermaster's Office at Chicago did exercise some functions in the local depot.

Captain Shugert was never appointed as contracting officer for the Packing-house Products Branch of the Subsistence Division of the Quartermaster General's Office (afterwards Office of Director of Purchase & Storage). The contracting officers named in these lists are grouped in two classes under the heads, "(A) Procurement Divisions, O. Q. M. G."¹ and "(B) General Supply Depots." In the first class under the subhead "Subsistence Division" would be found, of course, the name of the contracting and purchasing officer for the Packing-house Products Branch of that Division had any such appointment ever been made beyond the provision of Office Order No. 491 of the Acting Quartermaster General, putting the Depot Quartermaster at Chicago in immediate control of the Packing-house Products Branch. But nothing of the kind is to be found. The only place that Captain Shugert's name appears is under the second class, i. e., as contracting officer for one of the subdivisions of the General Supply Depot (Depot Quartermaster's Office) at Chicago. (See Purchase & Storage Notice No. 109, Government's Brief, pp. 115-120.) And right there it is necessary to correct a mistake in the Government's brief. It speaks of Purchase & Storage Notice No. 109 of December 2, 1918, as an appointment of Captain Shugert "as contracting officer for the Chicago Supply Depot, for Army subsistence, which included Army bacon." (P. 66.) There is no mention whatever of Army bacon either in that Notice or in Notice No. 179 of the Quartermaster General's Office of October 3, 1918. In each, opposite Captain Shugert's name, in parentheses, is the word "Subsistence." That is all. Moreover, two other officers are listed along with Shugert as contracting officers for subsistence in the Chicago Supply Depot. (See Notice No. 179, Government's Brief, pp. 105-106.)

¹ O. Q. M. G. stands, of course, for Office of the Quartermaster General.

The conclusion that neither the order of September 17, 1918, nor the notices of October 3 and December 2, 1918, conferred upon Shugert any authority to act as purchasing and contracting officer for the Packing-house Products Branch of the Subsistence Division of the Quartermaster General's Office, is put entirely beyond controversy by what took place in practice. Whereas, as the findings of the Court of Claims show, General Kniskern was continually making contracts for the purchase of packing-house products during this period, Shugert never made a single contract of the sort until some time in February, 1919, *after he had been transferred to the Packing-house Products Branch of the Subsistence Division of the Quartermaster General's Office at Chicago, following the abolition of the Packing-house Products and Produce Division of the Depot Quartermaster's Office.*¹

Fourth. Regardless of whether General Orders No. 55 were originally intended to apply to the purchase of meat supplies, and regardless of whether General Kniskern was ever designated as contracting officer for such supplies in accordance with the terms of those orders, a later order, namely, the before mentioned Office Order No. 491 of July 3, 1918, issued by the Acting Quartermaster General, whose office is particularly charged by law and custom with the duty and authority of purchasing subsistence supplies for the Army, delegated to General Kniskern, as we have seen, the purchase of meat supplies for the Army. (*Ante*, 123.) Exercising the authority so delegated, General Knis-

¹ Apparently it was assumed that by virtue of that transfer he became authorized to sign contracts for packing-house products. Whether that assumption was correct we need not consider, as it is of no importance to the present case. Moreover, the contracts signed by him in February, 1919, were mere paper transactions, as elsewhere shown. (*Post*, 139-140.)

kern purchased enormous quantities of bacon and other meats for the Army throughout the whole period in question. (*Ante*, 124.) What is more, as the opinion of the Court of Claims states (Rec. 58), no one ever questioned, much less revoked or disapproved, this order of the Acting Quartermaster General, or the authority exercised by General Kniskern thereunder, either on the ground that it conflicted with General Orders No. 55 or on any other ground. Indeed, other general orders, namely, General Orders No. 16 of February 11, 1918, specifically provided that "the general supply depots of the Quartermaster Corps will be operated in accordance with instructions received from the Quartermaster General through the several procurement divisions." (Finding IV, Rec. 28.) It follows that the Acting Quartermaster General's order of July 3, 1918, and the acts of General Kniskern thereunder were valid and binding under the decision of this Court in *Parish v. United States*, 100 U. S. 500. There, dealing with the case of an officer much lower in rank and authority than the Quartermaster General, it was held:

"It is not intended to deny that he was subordinate to the chief of his bureau; could be ordered to do or not to do particular things; and when an order made by him was disapproved, it might be revoked by that officer. *But until so revoked or disapproved it was valid and parties required to act under it had a right to rely on it.*" (P. 505.) [Italics ours.]

Fifth. Again regardless of whether General Orders No. 55 were intended to apply to the purchase of meat supplies, or whether General Kniskern was ever designated as contracting officer in accordance therewith, the contract would still be good if he were otherwise authorized by the Acting

Quartermaster General to purchase such supplies,¹ since those orders were directory only. (Compare *Clark v. United States*, 95 U. S. 538, 542.) The Annual Reports of the Secretary of War and the Quartermaster General of the Army show that during the War literally hundreds of instructions relating to the purchase of supplies for the Army were sent out from Washington. Hardly a day passed without some change. At times they were conflicting.² To hold that a contractor was chargeable with knowledge of these myriad instructions would create an impossible situation. The War Department itself has recognized this and made a distinction between knowledge of the statutes and "knowledge of the intricate administrative machinery resulting from war conditions." (*Claim of William Carter Co.*, Case No. 421, Decs. War Dept. Cl. Bd. App. Sec., Vol. VII, pp. 385, 386.)

Sixth. If the Government's contention were accepted—that no officer not designated in the manner and form provided by General Orders No. 55 had authority to contract for meat supplies for the Army and that Captain Shugert was the only officer so designated—the Court would be brought to the absurd conclusion that between June 10, 1918, when

¹ As we have seen, by Office Order No. 491, of July 3, 1918, the Acting Quartermaster General delegated to General Kniskern authority to purchase meat supplies for the Army.

² One instance of this—the conflict between General Orders No. 55 and Notices 28, 72 and 189 of the Quartermaster General's Office—has already been mentioned. (*Ante*, 126.) Another example is afforded by two of the orders appended to the Government's brief. General Orders No. 47 of May 11, 1918, instructed contracting officers to see that "every contract" made by them was reduced to writing and signed by the contracting parties with their names at the end thereof. (P. 99.) On the other hand, Paragraph 724, Manual for the Quartermaster Corps, authorized, "during the present emergency," "a short form, * * * similar to proposal and acceptance agreements," instead "of the usual formal contract," regardless of the amount involved, where "the time for delivery does not exceed thirty days." (P. 103.)

General Orders No. 55 were promulgated, and September 17, 1918, when Captain Shugert was designated as purchasing and contracting officer for the Packing-house Products and Produce Division of the Depot Quartermaster's Office at Chicago—the most critical period of the War—nobody had authority to purchase meat supplies for the Army.

Seventh. The whole contention was an afterthought. As the opinion of the Court of Claims shows, the authority of General Kniskern to make contracts for the purchase of meat supplies for the Army was not questioned when the case was before the War Department Board of Contract Adjustment, nor when it was before the Secretary of War, nor when it came before the Court of Claims until the very last stage. (Op. Ct. Cl., Ree. 59.) That such a contention should have been made at all in the face of the specific delegation of authority to General Kniskern above set forth, and in the face of the fact that throughout the period involved he entered into contracts for the purchase of literally hundreds of millions of dollars worth of such supplies with the full knowledge and approval of the War Department at Washington, only goes to show, like the attempted distinction between a contract *reduced* to writing and a contract *in* writing (*ante*, 47), how difficult it has been for the Government to find any ground for opposing this claim.

POINT VIII.

The contention that the contract was abrogated "by the mutual consent of the parties in submitting proposals and bids and entering into formal contracts for January and February, 1919, deliveries is contrary to the facts as found by the Court of Claims."

Since whether the parties *consented* to the abrogation of the contract is a question of fact, to support this contention

there would have to be either an express finding of such consent or findings from which it must necessarily be implied. Instead of that the findings are specifically to the contrary.

The contention assumes that the purpose of the "circular proposals" (to give them their technical name), sent to Swift & Company on December 19, 1918, and January 7, 1919, was to invite bids as a basis for entering into *new contracts* to take the place of the contract already made covering the January, February and March instalments, and that Swift & Company in responding acquiesced in that purpose.

The findings show that this assumption is directly contrary to the facts. (Finding X, Rec. 32; Finding XXII, Rec. 44; Op., Rec. 61, 76.)

The circular proposal is a War Department form, the *normal* use of which is to invite bids when contracts are let by competition. (Finding X, Rec. 32.) It will be recalled that in the Fall of 1917 the exigencies of the War compelled the War Department to abandon the competitive method of letting contracts for bacon and canned meats, and that from then on orders were *allotted*, first by the Depot Quartermaster at Chicago directly, and later through the agency of the Food Administration. (*Ante*, 4-5.)

The Depot Quartermaster, however, continued to use the circular proposal in connection with the allotment plan. But its function in that connection was entirely different from what it is under the competitive system. Under the competitive system the circular proposal precedes the order, and whether a bidder shall receive an order or not depends upon what price he inserts in his bid. Under the allotment system, on the other hand, the circular proposal came long after the order had been placed; it was not sent out in fact until the time arrived to fix the price under the order, which was just before the first of the month in which delivery was to be made, and therefore after production was far advanced.

(Finding X, Rec. 32-33.) Under the allotment system, moreover, those to whom circular proposals were sent were not at liberty to quote a price on the entire quantity or any part thereof, as under the competitive system, but only on the quantity that had previously been ordered from them. (Finding XXII, Rec. 44.) As during most of the time under the allotment system prices were determined monthly so also were the circular proposals sent out monthly. (Finding X, Rec. 32.) If in any case the price quoted had not been acceptable there would have been further negotiations until a price satisfactory to both sides was arrived at. (Finding X, Rec. 32-33.) In short, the circular proposal, being a form ready at hand, was used by the War Department under the allotment system as a convenient means of arriving at the price under an order already placed, and in accordance with a standard already agreed upon. (Finding X, Rec. 32-33.) The Court of Claims expressly so found:

"* * * the usual form of circular proposals were sent to the packers, not for use in submitting bids as under the peace-time competitive system, but as a convenient method of formal submission by the packers of their proposals as to price for the product which they had theretofore been requested to furnish during the month in question, and which already, by direction of the Depot Quartermaster, was in process of preparation." (Finding X, Rec. 32.)

During the period that the Food Administration was the agency for fixing the price of packing-house products purchased by the Government (Finding XXII, Rec. 43), the circular proposal, being a War Department form, fell into disuse. Before the time arrived, however, for fixing a definite price for the bacon ordered for delivery in January, February and March, 1919, the Food Administration, in con-

nection with the winding up of its affairs following the Armistice, had ceased functioning in the matter. So, on December 16, 1918, the Subsistence Division of the Quartermaster General's Office sent the Depot Quartermaster at Chicago a telegram reading as follows:

“Effective with January requirements, the Army will purchase packing-house products independently of Food Administration.

“This office is notifying Food Administration accordingly. You are authorized to proceed on this basis.” (Finding XXII, Rec. 44.)

This telegram was interpreted to mean that beginning with January the Food Administration would have nothing more to do with allotting orders for packing-house products for the Army, or with fixing prices thereunder, and that with respect to orders already placed, when the time for delivery came, the Depot Quartermaster would take the place of the Food Administration in arranging the price. (Op., Rec. 75-76.)

“Thereafter,” as found by the Court of Claims, “prices for January and February deliveries were determined as they had been during the earlier months of 1918 before that function came to be exercised by the Food Administration,” i. e., by the Depot Quartermaster, who used for that purpose the circular proposal as before. (Finding XXII, Rec. 44.)

This was the way the circular proposals of December 19, 1918, and January 7, 1919, asking Swift & Company to propose a price on the January and February deliveries, respectively, came to be sent out.¹ And, as before, Swift & Company *was instructed to quote a price only on the quantity previously ordered from it.* (Finding XXII, Rec. 44.) So

¹No circular proposal was sent to Swift & Company asking it to propose a price for the March instalment because the decision of the War Department not to take that instalment intervened.

far, therefore, from being an abrogation of the contract which arose from the Depot Quartermaster's order of December 10, 1918, accepting Swift & Company's offer of Army bacon for delivery in January, February and March, 1919, this action was an express recognition of that contract. In other words, here, just as during the period that the Depot Quartermaster was allotting orders and fixing prices before the entry of the Food Administration upon the scene, the circular proposal was used as a mere convenience in arriving at the price under an order already given, and already in process of being filled. It was not "a change in the methods of purchase," at all, as the Government's brief (p. 54) states it was. Not until March 20, 1919, did the War Department return to the competitive method of procuring supplies. (See Purchase & Storage Notice No. 105, War Dept., Purchase, Storage & Traffic Division, Office of Director of Purchase & Storage, Washington, March 20, 1919.)

A final and conclusive reason why the sending out of the circular proposals of December 19, 1918, and January 7, 1919, asking for prices on the January and February deliveries, respectively, could not have been for the purpose of inviting bids for *new orders*, but could only have been, as the Court of Claims found, for the purpose of arriving at prices under orders *already placed and in process of being filled*, is that the time required—about sixty days—would have made it physically impossible to perform a contract entered into on or after December 19, 1918, for the manufacture of bacon for delivery in January, 1919, or a contract entered into on or after January 7, 1919, for the manufacture of bacon for delivery in February, 1919.

As regards the so-called formal contracts subsequently executed covering the January and February instalments, they were merely paper transactions. The contracts covering the January instalment were dated "as of" February 10,

1919. The true date does not appear. They were not signed by Swift & Company until March 8, 1919. (Finding XXII, Rec. 45.) Just when they were signed on behalf of the United States does not appear but the approval of the Director of Purchase and the Board of Review was dated February 26, 1919. (Finding XXII, Rec. 45.) But even on February 10, the January instalment had not only been manufactured but practically all delivered, delivery having been completed on February 11. (Finding XXII, Rec. 44.) The formal contract covering the February instalment was not executed by Swift & Company until March 12, 1919. (Finding XXII, Rec. 45.) The approval of the Director of Purchase and the Board of Review was dated March 1, 1919. (Finding XXII, Rec. 45.) It was signed by the contracting officer on behalf of the United States "as of the 4th day of February, 1919." (Finding XXII, Rec. 45.) [Italics ours.] The true date does not appear. Here too, therefore, at the time the formal contract was executed the bacon had not only been manufactured but delivered, delivery of the February instalment having been completed on March 3. (Finding XXII, Rec. 44.)

In *American Smelting & Refining Co. v. United States*, 259 U. S. 75, where, as here, a more formal contract was executed after the "contract by letters" had been performed, this Court said:

"We have said nothing about repeated requests that the claimant should sign a formal contract, its refusals, and its ultimate signing under protest, because these facts in no way modify the relation of the parties under the contract by letters already made." (P. 79.)

The Government cites the case of *Brown v. District of Columbia*, 127 U. S. 579, and states that the facts here are

similar to what they were there. The very passage which the Government's brief quotes from the opinion in that case shows, however, that the facts of the two cases were entirely different. There, the District of Columbia *refused to accept any of the work* done under the alleged earlier contract, or to recognize it in any way, and further, the later contracts were different in terms from the earlier one. Here, not only did the Government recognize the earlier contract, but had accepted delivery of the product before the so-called formal contracts were executed. Nor were these latter different in terms. They added some details but the essential terms remained the same.

POINT IX.

The Court of Claims was right in taking as the measure of damages with respect to the 4,197,672 pounds of canned bacon, i. e., the finished product, the difference between the contract price and the net proceeds of the resale.

The Government contends that this was the wrong measure of damages; that the general rule of damages for breach of an executory contract of sale should have been applied, i. e., "the difference between the purchase price and the market value of the goods at or about the time and place of delivery or breach." (Government's Brief, p. 95.)

Damages for breach of contract cannot be measured by any mere rule of thumb. "Compensation," this Court has recently said again, "is a fundamental principle of damages, whether the action is in contract or tort. One who fails to perform is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by the performance of the contract."

(*Miller v. Robertson*, No. 145, October Term, 1924, decided November 17, 1924.)

To give effect to this principle certain general rules of damages have been formulated. But where a general rule will not work out compensation in a particular case because of peculiar circumstances "some other [standard], which is fairly compensatory to the one party, and not unjust to the other, must be resorted to." (*Sutherland on Damages*, 4th ed., § 647.)

1. It is settled law that the measure of damages contended for by the Government is not applicable to the case of a breach of contract for the sale of a special kind of article to be manufactured to order and for which there is no established market in the ordinary commercial sense.

The following from 24 Rul. Case Law, § 390, p. 121, accurately sums up the law on this subject:

"Where the character of the commodity or article sold is such that there is no general market for it at or near the place of delivery, or where there is no general purchaser for the same except the buyer, it is necessary that some other criterion be taken than the difference between the agreed price and the general market value, and in such a case it has been held that the seller is entitled to recover the difference between the agreed price and the price at which he is compelled to resell."

In *Bookwalter v. Clark*, 10 Fed. 793, the Court, after considering the general rule, which the Government claims is applicable here, said:

"But where a person orders an article to be manufactured according to a certain measure, pattern, or style, as a suit of clothes, or a carriage, or a steam-engine, here, I think, the weight of authority and the best reason concur that the manufacturer, after he

has completed his contract and tendered the article, is entitled to recover the contract price.

"The reason for the distinction is that in such cases there is presumably no market value for goods made according to such a specific order, and that the manufacturer having done all that is required of him to do to entitle him to the full benefit of his contract, he cannot, with any certainty, have this full benefit in any other way." (P. 796.)

In *Fisher Hydraulic Stone & Machinery Co. v. Warner*, 233 Fed. 527, C. C. A. 2nd, after referring to the New York rule, which permits recovery of the full contract price regardless of whether the article is a special one, the Court said:

"We do not need to go as far as this, and prefer to limit our decision to cases where the goods are of a special kind, having no ordinary market value. Such a conclusion has been reached as to articles having no established market value in *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Shawhan v. Van Nest*, 25 Ohio St. 490, 18 Am. Rep. 313; *Ballentine v. Robinson*, 46 Pa. 177; *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698; *Gordon v. Norris*, 49 N. H. 376; *Kinkead v. Lynch* (C. C.) 132 Fed. 692; *Ideal Cash Register Co. v. Zunino*, 39 Miss. Rep. 312, 79 N. Y. Supp. 504; *Van Brocklen v. Smeallie*, 140 N. Y. 70, 35 N. E. 415; *National Cash Register Co. v. Dehn*, 139 Mich. 406, 102 N. W. 965. That this in effect grants specific performance may not be consonant with certain legal theories as to the law of personal property, but it is warranted by good authority and eminently just. A very interesting discussion of the law applicable to this subject by Professor Williston appeared in volume 20 of the Harvard Law Review, at page 363. The Roman law seems to have allowed the recovery of the purchase price when the purchaser refused to accept, and such, we understand, is the law in France and Germany." (Pp. 529-530.)

Other cases to similar effect in the Federal courts are cited below.¹

The Uniform Sales Act, § 64 (3), which, as Mr. Williston states (2 Williston on Sales, 2d ed., § 580, p. 1433), "clearly states the rule of the common law," expressly recognizes that the rule of damages invoked by the Government is inapplicable where there is no available market for the goods or where there are other special circumstances.²

Not one of the cases cited by the Government involved a specially manufactured article, for which there was no general or established market.³

Indeed, the Government concedes that the rule it invokes

¹ *Kinkead v. Lynch*, 132 Fed. 692; *Leyner Engineering Works v. Mohawk Consol. Leasing Co.*, 193 Fed. 745; *Manhattan City etc. Ry. Co. v. General Electric Co.*, 226 Fed. 173; *Frederick v. American Sugar Refining Co.*, 281 Fed. 305. See also, 51 L. R. A. (N. S.) 735, Note, IV, a, p. 745; V, b, p. 754.

² The language of the Act is: "Where there is an *available market* for the goods in question, the measure of damages is, *in the absence of special circumstances*, * * * the difference between the contract price and the market's current price at the time or times when the goods ought to have been accepted * * *." [Italics ours.] The words "available market" must be construed in connection with § 63 (3) of the Act (2 Williston on Sales, 2d ed., § 582, p. 1436, foot-note 40a; *Frieburg Mahogany Co. v. Batesville Lbr. etc. Co.*, 285 Fed. 485), which provides what the seller may do if the goods "cannot readily be resold for a reasonable price." This clearly indicates that what is meant by an available market is one in which the goods can readily be resold for a reasonable price.

³ *Shepard v. Hampton*, 3 Wheat. 260 (cotton, breach by vendor); *Smith v. Pettee*, 7 Hun (N. Y.) 334, (iron); *Warren v. Stoddart*, 105 U. S. 224, 229 (contract for personal services); *Friedenstein v. United States*, 35 Ct. Cl. 1 (copper); *Harkness v. Russell*, 118 U. S. 663 (engines, boilers and portable saw mill); *Carpenter v. First National Bank*, 119 Ill. 353 (corn); *Pittsburgh, Cincinnati & St. Louis R. R. Co. v. Heck*, 50 Ind. 303 (wood); *Dollman v. Studebaker*, 52 Ind. 286 (exchange of a farm for shares of stock); *Fell v. Muller*, 78 Ind. 507 (yeast); *Malcom v. Reeves Pulley Company*, 167 Fed. 929 (air-cooled automobile engines. While water-cooled engines are more generally used, it is common knowledge that air-cooled engines are used in at least one of the leading makes of automobiles.)

is inapplicable where the contract is for the manufacture of an article "for a special purpose and a special person" [and which], cannot readily be resold as an article of commerce." (Government's Brief, p. 91.)

It contends, however, that Army bacon is not such an article. That contention is foreclosed by the specific findings of the Court of Claims, that "Army bacon was not a commercial product and not readily salable as such" (Finding XXVIII, Rec. 50); that it was prepared and packed altogether differently and tasted more strongly of salt and smoke (Finding XX, Rec. 43.) Not only, indeed, was it manufactured "for a special purpose and a special person," but it was never manufactured for any other purpose or any other person. From these findings the Court concluded—

"that there was no market value in the true sense. This was not a commercial product, there was but one customer [as the name Army bacon indicates], and when that customer declined to take it there was no market except as it might be created." (Op., Rec. 81-82.)

No other conclusion was possible unless it be held that to establish that there is no market for an article in the usual commercial sense it must be shown that the article cannot be sold at *any price*. That, of course, is not the law. What constitutes a market in the ordinary commercial sense is indicated in the following passage from a recent decision of this Court:

"Where there is no market value *such as is established by contemporaneous sales of like property in the way of ordinary business*, as in the case of merchandise bought and sold in the market, other evi-

dence is resorted to." (*Standard Oil Co. of N. J. v. Southern Pacific Co.*, No. 197, October Term, 1924, decided April 20, 1925.) [Italics ours.]

Lastly, let us put the Government's contention to a practical test. If it were the legal duty of Swift & Company to resell this 4,197,672 pounds of bacon at the *time* of delivery called for by the contract, it would have been equally its duty, under the rule invoked by the Government, to sell it at the agreed *place* of delivery. Likewise, it would have been the duty of the other packers having similar contracts to do the same. Thus this enormous quantity of bacon would have had to be disposed of at practically one time and one place. The consequences of such a course do not need to be pointed out.

2. In the present case, as shown elsewhere (*ante*, 61, 68), the goods had been completely manufactured and tendered, and title had passed. In such cases, regardless of whether the article is one for which there is no established market, the universal rule is that the measure of damages is the one applied by the Court of Claims—the contract price, less, of course, the net proceeds of the resale.

3. The result would be the same even though the measure of damages contended for by the Government were held applicable, i. e., the difference between the contract price and the market value of the goods "at or near" the time and place of delivery or breach. For where that rule of damages is applicable the market value can be established by a resale of the goods within a reasonable time. (*A. B. Small Co. v. Lamborn & Co.*, No. 100, U. S. Sup. Ct., October Term, 1924, decided March 2, 1925.) In the present case there was a resale, and as shown under the next Point, it was made within a reasonable time under the circumstances. (*Post*, 147-151.)

POINT X.

The finding of the Court of Claims that Swift & Company exercised due diligence in reselling the 4,197,672 pounds of canned bacon after the United States refused to take it is not reviewable and is right in any event.

1. The finding is not reviewable.

While the Court of Claims did not in so many words find that Swift & Company exercised due diligence in reselling this bacon, that is necessarily implied from its findings and judgment as a whole; and, of course, facts necessarily implied are taken as established equally with facts expressly found. (*United States v. R. P. Andrews & Co.*, 207 U. S. 229, 240, 52 L. ed. 185, 187, 190.) The implication in this instance is corroborated by the opinion of the Court, which, after setting forth the circumstances under which the resale was made, expressly states that Swift & Company "did its full duty in this respect," and "that the situation was handled as well as could be." (Rec. 82.) Indeed, the Government's brief speaks of the Court of Claims' "*finding* that the claimant had exercised due diligence." (P. 95.) [Italics ours.]

This finding is conclusive, since whether Swift & Company exercised due diligence in reselling the bacon was a question of fact, or at most one of mixed fact and law.¹

2. The finding is right.

First. There was no unreasonable delay.—But if the question were still open, this Court, on the facts, would have to reach the same conclusion that the Court of Claims did.

¹ See *A. B. Small Co. v. Lamborn & Co.*, No. 100, October Term, 1924, decided March 2, 1925, where it was assumed that the question is ordinarily one for the jury, the point in controversy there being whether the trial Court was justified in taking the question away from the jury because of the conclusiveness of the evidence.

Assuming, as the Government's brief states (p. 79), that the Zone Supply Officer's letter of April 24, 1919, *stating that preliminary steps toward a settlement were being taken*, was notice to Swift & Company that the Government would not accept this bacon,¹ that date is not the proper starting point from which to reckon whether Swift & Company exercised due diligence in making the resale.

The method of settlement—or whether any settlement at all should be made, if the Government prefers to have it that way—had to be considered with care, since much was involved. That question was still under consideration as late as August 29, 1919, as shown by the Zone Supply Officer's letter of that date to Swift & Company. (Finding XXVI, Rec. 48.) As the opinion of the Court of Claims states, "it had as yet been undetermined whether the Government would take the product in question and thus settle the matter, or allow the plaintiff to retain and dispose of it on a salvage basis." (Rec. 82.) Manifestly, with the settlement still under discussion and the method of settlement still undetermined, Swift & Company could not be expected to take the risk of disposing of the product without some word of assurance that that course would meet with the approval of the Government. Compare *The S. L. Watson*, 118 Fed. 945, 950-951, C. C. A. 1st. It got that word for the first time when it received the Zone Supply Officer's letter of August 29, 1919, stating that while he was still unable to give "positive and definite instructions as to the disposal of any of this product," he advised that it "be disposed of at the earliest possible moment." The letter gave the price at which sales were

¹ Bear in mind the distinction between this bacon, which was already in smoke when the notice of March 5, 1919, was received, and was completed in accordance with that notice, and the 1,068,539 pounds of cured or salt bellies, which were not in smoke, and which Swift & Company was directed by the notice of March 5 to use every effort to dispose of. (*Ante*, 13-14.)

then being made by the War Department—34 7/12 cents per pound—and added: "Any sales that you may make at the price which is now being charged through the parcels post, and to individuals, would, in the judgment of this office, be entirely in the interests of the Government." (Finding XXVI, Rec. 48.)

Swift & Company acted promptly on this advice, employing all its facilities to the end of getting the best possible price. It began selling the bacon at 33½ cents per pound, wholesale,¹ which, allowing a margin of one cent a pound for the retailer, was practically what the Government was asking, the Government's price above mentioned being a retail price. It reduced the price thereafter only when the Government did. It expressly instructed its representatives not to sell below the Government's price. The sale continued steadily, and by January, 1920, all but a few odd lots had been disposed of. (Finding XXVIII, Rec. 49.)

There was still another reason why Swift & Company was not free to proceed with the resale until it received the Zone Supply Officer's letter of August 29, 1919. The Government had on its hands a large surplus of this same product. (Finding XXVIII, Rec. 49.) The problem was thus a joint one and joint action was necessary in the common interest. Had Swift & Company gone ahead with the resale without waiting, as it did, for the officers of the War Department to consider the problem and give their advice, it would now be charged with aggravating the loss on the much greater quantity that the Government had to dispose of by acting precipitately in its own interest.

But, going back to the Zone Supply Officer's letter of April 24, 1919, as the starting point, there was still no unreasonable delay in making the resale.

¹ Swift & Company had no retail facilities. (Finding XXVIII, Rec. 49.)

How to dispose of this bacon to the best advantage presented a most perplexing and wholly novel problem. Besides the 4,197,672 pounds which Swift & Company had, the action of the Government also left the other packing companies with large quantities of the same product to dispose of. (Finding XXVIII, Rec. 49.) On top of that the Government had in its own supply depots a large surplus which had to be disposed of. (*Ibid.*) The problem of disposing of this enormous quantity would have been difficult if the article had been one for which there was a ready market. Not being a commercial article at all (Finding XX, Rec. 42-43; Finding XXVIII, Rec. 50), and being disagreeable to the taste besides (Finding XX, Rec. 43), the difficulties appeared well-nigh insurmountable.

There had to be a full discussion of the subject between the packing companies and the proper officers of the Government, since the latter not only had an interest in seeing that the former got as good a price as possible for the Army bacon left on their hands, but a greater interest, because of the much larger surplus in its own supply depots, in seeing that what market there was for this product did not become demoralized by hasty or indiscriminate selling by any one of the parties.

The language of this Court in *A. B. Small Co. v. Lamborn & Co.*, No. 100, October Term, 1924, decided March 2, 1925, comes to mind:

“The state of the market was such that it was difficult to make any sales; and the quantities to be sold enhanced that difficulty and also the *need for care.*”
[Italics ours.]

To consider with the proper care all the possibilities of the case before adopting any plan of disposition, and to organize the plan after it was adopted, required no little

time. Certainly it cannot be said, as a matter of law, that from April 24, 1919, to September, 1919, was an unreasonable time for this purpose.¹

Compare *Frederick v. American Sugar Refining Co.*, 281 Fed. 305, C. C. A. 4th, where the resale did not take place for four months and the article was a staple commodity. Also, *Garcia & Maginna Co. v. Washington Dehydrated Co.*, 294 Fed. 765, C. C. A. 9th, where the resale was not made for five months. The Court there said:

"It is argued that resale having been had five months after breach, the time was not reasonable. The evidence is that diligence was shown by the plaintiff and all fair effort was made to effect the best sale possible. The apples were sold at a better price than plaintiff obtained for its apples." (P. 768.)

Second. Due diligence having been exercised, whether a better price could have been obtained earlier is immaterial.—Swift & Company having exercised due care and diligence in making the resale, it would make no difference even though, as the Government suggests, a better price could have been obtained had the resale been made sooner. For, as this Court has recently decided:

"The real question * * * was whether the resales were fairly made in a reasonably diligent effort to obtain a good price, and not whether the plaintiff got the best possible price, or as much as

¹ In one place the Government's brief speaks of the resale as having taken place "from five to thirteen months after default." (P. 83.) This gives a wrong impression. According to the Government's own view of the case its default dates from the Zone Supply Officer's letter to Swift & Company of April 24, 1919. The Court of Claims found that Swift & Company commenced reselling the product in September, 1919, and that 98½ per cent of it had been resold by January, 1920. (*Finding XXVIII*, Rec. 49.)

others got in particular instances." (*Small Co. v. Lamborn & Co.*, No. 100, Oct. Term, 1924, decided March 2, 1925.)

Third. The Government did not prove that any better price could have been obtained earlier.—Where a seller who has kept his contract has suffered a loss in an honest effort to resell for the best price possible goods left on his hands by a defaulting buyer, the burden is upon the latter to show that the loss was unreasonably incurred—that it could have been avoided or reduced by selling the goods at a more favorable time.

As this Court said in *United States v. Behan*, 110 U. S. 338:

"The claimant has not received a dollar, either for what he did or for what he expended, except the proceeds of the property which remained on his hands when the performance of the contract was stopped. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought, at least, to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. *If they were foolishly or unreasonably incurred, the Government should have proven this fact. It will not be presumed.*" (Pp. 343-344.) [Italics ours.]

The only basis for the suggestion that a better price could have been obtained had the resale been made sooner is an inference which the Government draws from the finding of the Court of Claims that the price of hogs was rising in 1919 down until the month of August, when it began to decline, and that this was reflected to a greater or less extent in different commercial pork products. (Finding XXVIII, Rec. 50.) But the Court immediately added that Army bacon

was not a commercial product, and that even as to commercial bacon it was not definitely shown to what extent the price was influenced by the condition recited. (Finding XXVIII, Rec. 50.) By the very terms of this finding, therefore, the inference which the Government seeks to draw from it is excluded. Moreover, when it comes to drawing inferences, there is at least as much reason for saying that the pressure upon the market of the enormous surplus of Army bacon which the Government and the packers began offering in August and September is what caused the price of hog products to commence to decline at that time, and that the same result would have followed if this great surplus had been thrown on the market earlier.

The fact is that the price realized by Swift & Company was a good one considering that Army bacon is not a commercial article and has a disagreeable flavor of salt and smoke besides, and that enormous quantities of it were hanging over the market.

Fourth. Swift & Company had the right to resell the bacon at any time while the Government's default continued.—While we have shown not only that the bacon was disposed of within a reasonable time under the conditions, but that there is no ground for saying more could have been realized by disposing of it sooner, the rule requiring the resale to be within a reasonable time only applies where the damages are measured by the difference between the contract price and the market value at the time and place of the breach, and the resale is made for the purpose of establishing such market value. Of course, the resale is of no use for that purpose unless it takes place substantially at the time of the breach. The rule has no application where, as here, the contract has been completely performed and the measure of damages is the full contract price. (*Ante*, 141.) In such a case there is no need to resell the goods for the purpose of

establishing the market value. The seller, however, instead of holding the goods and suing for the full contract price, may elect to resell them and sue for the difference between the proceeds and the contract price. And he may make that election *at any time while the buyer's default continues*, provided, of course, good faith be exercised. A good example of cases of this class is *Frederick v. American Sugar Refining Co.*, 281 Fed. 305, C. C. A. 4th, where there was a delay of four months in making the resale. The Court there said:

"The case of *Rosenbaum v. Weeden, Johnson & Co., supra* [8 Grat. 785, 98 Am. Decs. 737], in its essentials, is very much like the instant case, and will be found to contain a full and most interesting discussion of this entire subject. There Judge Moneure, President, speaking for the Supreme Court of Appeals of Virginia, said:

"If a vendee of goods refuse to accept them when tendered according to the contract of sale, the vendor may elect to rescind the contract and keep or dispose of the goods for his own use, or to let it remain in full force and hold the vendee liable for the price of the goods and all damages arising from his breach of the contract. If he elect to let the contract remain in full force, he may either bring his action for the price of the goods when it is due and payable, or he may sell the goods, apply the net proceeds of sale to the credit of the vendee on account of the money due by him, and bring an action against him to recover the balance. * * * The plaintiffs, as we have seen, had a right of election to sell these goods or not, and could elect to sell them at any time while they remained in their hands, and the default of the defendants continued. And this right was not at all affected by the fact that the goods, during all the time they remained in their hands, were falling in their market value. They still had a lien upon the goods which they could enforce or not, at their elec-

tion. The defendants' plain remedy, as before mentioned, was to comply with the terms of sale, and take away the goods. There could be no room, then, for saying that the plaintiffs delayed the resale for an unreasonable time upon a falling market, since they might elect to sell at any time and in any state of the market.' " (P. 309.)

POINT XI.

The judgment should be modified by including the amount of the loss sustained by Swift & Company on the 1,003,313 pounds of cured or salt bellies resold in European markets.

When the notice of March 5, 1919, to put no more bacon in smoke was received, Swift & Company had left on hand 1,068,539 pounds which had been cured for the purpose of filling this contract, but had not been smoked or canned—referred to in the record as cured or salt bellies. (Finding XXIII, Rec. 45; *ante*, 13.)

The notice directed that all such unfinished material be disposed of, but imposed no restrictions as to the place, merely stating, "You are instructed to use every effort to dispose of such material as you now have on hand in order that adjustment may be quickly made." (Finding XIX, Rec. 42.)

One million three thousand three hundred and thirteen (1,003,313) pounds of these salt bellies were shipped by Swift & Company to European markets in the belief, as the Court of Claims expressly found, "that at this time it would find a good market [there] because of the reported shortage of food products." (Finding XXX, Rec. 51.)

The great bulk of the shipments was made in April, 1919, and none later than June. (Finding XXX, Rec. 51-52; *ante*, 14.) So there was no unreasonable delay.

The expected demand did not materialize, however, and a loss of \$212,216.69 resulted—the excess of the cost of production over the net amount realized, as found by the Court of Claims. (Finding XXX, Rec. 51; Finding XXXI, Rec. 53; *ante*, 14.)

As stated, the Court expressly found that in disposing of these bellies in Europe Swift & Company acted in the belief that it would find there a good market because of the reported shortage of food products, and that at the same time it exported to the same market large quantities of its own products on which it sustained similar losses. (Finding XXX, Rec. 52.) This finding, coupled with the fact that the great bulk of the shipments was made within about a month after notice to dispose of the unfinished materials was received (*ante*, 14), necessarily implies that Swift & Company exercised good faith and reasonable care and diligence.¹ Indeed, the opinion of the Court, while not a part of the findings, expressly states "that in seeking a foreign market for this product plaintiff was acting in perfect good faith and in accordance with its best business judgment, based on former experiences in exporting and information then at hand as to markets to be anticipated abroad." (Rec. 83.)

Nevertheless the Court disallowed this loss on the ground that it was the duty of Swift & Company to resell the product in this country or show that no better price could be obtained here. (Op., Rec. 83.)

We contend that Swift & Company performed its full legal duty in connection with the resale when, as the Court found, it exercised good faith and reasonable diligence; in other words, that where a defaulting buyer requests the seller

¹ Facts necessarily implied in findings of the Court of Claims are taken as established equally with facts expressly stated. (*United States v. R. P. Andrews & Co.*, 207 U. S. 229, 240, 52 L. ed. 185, 187, 190.)

to make a resale of the goods, or where he has notice that the seller intends to make a resale, and in either case gives no directions as to the manner or place of conducting the resale, but leaves that to the discretion of the seller, he is bound by the result, provided only the seller acts in good faith and with reasonable care and diligence.

This Court so held in two cases involving the rights and duties of a seller in making a resale after default by the buyer, decided after the decision of the Court of Claims in the present case:

"Besides, the real question was not whether the plaintiff got the best possible price, or as much as others got in special instances, but whether the resale was fairly made in a reasonably diligent effort to obtain a good price." (*A. B. Small Co. v. American Sugar Refining Co.*, and *A. B. Small Co. v. Lamborn & Co.*, both decided March 2, 1925.)

Williston states the rule as follows:

"The law, therefore, 'is satisfied with a fair sale made in good faith according to established business methods, with no attempt to take advantage of the vendee,' and in every case it is a question of fact whether the resale complies with this requirement, the burden of establishing this, it seems, being upon the seller." (2 Williston on Sales, 2d ed., § 547, p. 1371.)

The only limitation or qualification prescribed by the Uniform Sales Act in defining the right of resale is that—

"The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale." (§ 60, par. 5.)

In *Dustan v. McAndrews*, 44 N. Y. 72, the New York Court of Appeals held that where the seller resells the goods after default by the buyer—

"all that is required of him is, that he should act with reasonable care and diligence, and in good faith. He should make the sale without unnecessary delay, but he must be the judge as to the time and place of sale, provided he act in good faith and with reasonable care and diligence." (P. 79.) [Italics ours.]

In *White Walnut Coal Co. v. Crescent Coal & Mining Co.*, 254 Ill. 368, 98 N. E. 669, the Supreme Court of Illinois laid down the same rule:

"The question under consideration is not, however, a new one, but has received the consideration of courts and text writers, and the authorities are practically uniform that the vendor is not bound to resell at the contract place of delivery or within the contract time for delivery. * * * The place of delivery under the contract is not excluded from the markets where a resale may be made; but if the vendor resells at the place of delivery he does so, not because the contract designates such place for the delivery, but because, in the exercise of his best judgment and discretion, he believes that such place is the most advantageous market. Where a resale has been made in good faith after notice to the vendee the difference between the net amount realized from such resale and the contract price is the proper measure of damages. The effect of the resale when properly made is to liquidate the damages, and is conclusive upon both parties." (Pp. 375-376.)

Likewise the Supreme Court of Texas in *Waples & Co. v Overaker & Co.*, 77 Tex. 7, 13 S. W. 527, 19 Amer. St. Rep. 727:

"It is urged that appellees had no right to ship the wheat to New Orleans for sale and make the price at

which it there sold the basis of the recovery; that it should have been sold in Sherman or in the nearest market.

"It is the duty of the seller in such a case to exercise good faith and to realize the best price he can on resale; but if in the light of the facts before him, obtained in the exercise of due diligence, he pursues the course which prudence would dictate to a man of ordinary prudence, then the defaulting buyer ought not to be heard to say that the market in which the thing was sold was not in fact the most advantageous one.

"If appellants desired to select the market they ought to have received the wheat and sent it to that market. * * *. (77 Tex. 13.)

It is unnecessary to go on citing the cases on the subject. They are fairly summed up in Mechem on Sales, § 1638, as follows:

"With respect of the place at which the resale should be made, no hard and fast rule can be laid down. A particular place is not to be insisted upon, but good faith and a fair and reasonable endeavor to get the best available price for the goods are essential. The place at which the buyer was to receive the goods is not necessarily the best place for the resale; neither is the nearest market or even a market within the State, necessarily the most appropriate. Regard must be had for the character of the goods and the times, circumstances, and places that regulate and control their prices."

It is immaterial in this connection whether or not title to these salt bellies had passed to the United States, since the right of resale exists both where title has passed to the buyer and where it still remains in the seller. (2 Williston on Sales, 2d ed., §§ 505, 506, pp. 1311, 1312.) Besides, in the present instance, as we have seen, the United States expressly

requested Swift & Company to dispose of the material left on its hands.

Nor need we consider the cases where the measure of damages is the difference between the contract price and the market value of the goods at the time and place of delivery, and the price realized on the resale is offered as evidence to prove the market value of the goods at *that* time and place. There, of course, unless the resale was made at the time and place of delivery, or as near thereto as practicable, the price realized would be inadmissible as evidence to prove the market value of the goods at *that* time and place.

Here the resale was not made for the purpose of proving the market value of the article contracted for at the time and place of delivery, but for the purpose of salvaging materials left on the seller's hands, in which case, as we have seen, the place of resale, in the absence of directions from the buyer, is in the seller's discretion, provided only that he make "a reasonably diligent effort to obtain a good price." (*Ante*, 157.) That condition, so far from requiring the resale to be made at the place of delivery specified in the contract, may require it to be made elsewhere. Not only, moreover, was the price realized from the resale of the salt bellies not offered to prove their market value at the place of delivery under the contract, but there was no occasion for proving their market value at that place, *first*, because they were not the article contracted for but unfinished product only, and, *second*, because in the case of contracts for the sale of a special kind of article to be manufactured to order, and for which there is no regular market, the market value of the article at the place of delivery is not a factor in the measure of damages.

It has occurred to us that in holding that Swift & Company had no legal right to resell the salt bellies abroad without first attempting to dispose of them in the home market, the Court of Claims may have been under the impression that the Depot Quartermaster's letter to Swift & Company of August 29, 1919, stating amongst other things that, "In the judgment of this office if you are able to dispose of this product by a sale *within the limits of the United States*, it would be a perfectly proper procedure, etc.," (Finding XXVI, Rec. 48) [italics ours], had reference to the salt bellies as well as the canned bacon. That is not the case, however. The salt bellies had already been shipped to Europe. (See Finding XXX, Rec. 51.) The letter of August 29, 1919, gave directions as to the disposition of the *canned* bacon only—the completed product. Directions as to the disposition of the unfinished product, including the salt bellies, were contained in the Depot Quartermaster's letter of March 5, 1919, which, as we have seen, made no suggestion as to the place of resale. (Finding XIX, Rec. 41.)

It remains to say that in the absence of directions to the contrary it was not only the natural and proper thing for Swift & Company to ship these bellies to European markets in view of the reported shortage of pork products there and the enormous surplus in the hands of both the packers and the War Department overhanging the home market, but it hardly had any choice considering the character of the information mentioned in the opinion of the Court of Claims as "then at hand as to markets to be anticipated abroad." (Rec. 83.)

Thus a bulletin issued by the Food Administration on January 12, 1919, stated:

"As the result of the investigations made up to January 1st, Mr. Hoover cabled from London: 'Every pound of pork products we can export before next July, Europe will need, and as soon as the initial chaos of the sudden economic change from war to armistice can be overcome, there will be over-demands. For another month we will be unable to determine what the volume of this task is'." (U. S. Food Administration Official Statements, Washington, D. C., Vol. 1, No. 10, Issue of January 12, 1919, p. 3.)

Another bulletin of the Food Administration, issued March 5, 1919, stated:

"The European demand for hog products will increase rather than diminish. The supply of live hogs coming to market in March and April will be greatly reduced in numbers. The European markets are opening rapidly to free trading in hog products, and the area to be supplied is being made increasingly accessible. The enemy countries are to be given opportunity to secure hog products and other foods." (U. S. Food Administration Announcement No. 1395, March 5, 1919.)

The Report of the Agricultural Commission to Europe, published January 17, 1919, stated:

"The Commission, basing its opinion on such observation as it was able to make and upon such sources of information as were available, affirms the belief that crop conditions and prospects in the principal countries of the world justify the statement that for the staple food and fiber products grown in the United States, such as wheat, *meat*, sugar, cotton, and wool, there will prevail a strong demand, and that prices will probably continue steady and at a high level." (P. 87.) [Italics ours.]

With these Government bulletins before it, had Swift & Company sold these salt bellies in the home market at a loss—and the few sales made in this country show that they could not have been sold here except at a loss (Op., Rec. 51, 83)—we may depend upon it that the Government would now be arguing that Swift & Company was derelict in not taking advantage of the favorable opportunities of the European market, as they then appeared.

CONCLUSION.

The judgment of the Court of Claims should be affirmed, after first being modified by including the amount of the loss on the unfinished material—the salt bellies—sold abroad.

Where a judgment of the Court of Claims either includes or omits an item erroneously, "this does not render it necessary to reverse the judgment in its entirety, but only to modify the same." (*United States v. Eaton*, 169 U. S. 331, 352, 42 L. ed. 767, 775.)

Respectfully submitted,

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APPENDIX A.

A contract resulted from the Food Administration's allotment order of December 3, 1918, placed at the request of the Depot Quartermaster, and Swift & Company's acceptance thereof.

On August 10, 1917, an Act was passed, "To provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel." (40 Stat. 276, ch. 53.)

Section 1 declared that "by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the War, and for the support and maintenance of the Army and Navy,"

(a) "To assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel * * *,"

(b) "To prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations and private controls, affecting such supply, distribution, and movement;"

(c) "To establish and maintain governmental control of such necessities during the War."

The same section further provided that to carry into effect these objects "the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred and prescribed." It concluded with a broad grant of authority to the President "to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act."

Section 2 added:

"That in carrying out the purposes of this Act the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to accept the services of any person without compensation, to co-operate with any agency or person, to utilize any department or agency of the Government, and to co-ordinate their

activities so as to avoid any preventable loss or duplication of effort or funds."

Section 9 provided:

"That for the purposes of this Act the sum of \$150,000,000 is hereby appropriated, * * * to be available during the time this Act is in effect."

Speaking of this Act in a recent case, this Court said:

"It vested the President with *extraordinary powers* over the property of individuals, which might be exercised through an agent at any place within the confines of the Union with many consequent hardships." (*Houston Coal Co. v. United States*, 262 U. S. 361, 365, 67 L. ed. 1028, 1029.) [Italics ours.]

Under authority of this Act the President by an executive order created the United States Food Administration and delegated to it *all* the powers and authority conferred upon him by the Act so far as the same applied to foods, feeds and their derivative products. (Finding XII, Rec. 33.)

By proclamation dated November 21, 1919, the President ratified and adopted all the acts done or authorized by the Food Administration. (41 Stat. pt. 2, p. 1774.)

The acute shortage which developed during the War in some of the most essential articles of food because of the extraordinary demands of our own Army and Navy, our Allies, made it necessary to create a central control over their purchases in order to conserve the supply, ensure an equitable distribution thereof, and prevent inflation of prices.

On November 17, 1917, the United States Food Administrator advised the Secretary of War and the Secretary of the Navy of the situation which existed in this regard, stating that because of the abnormal conditions the peace-time method of making purchases for the Army and Navy by inviting bids "is not only impossible in some cases but raises the prices and stimulates speculation, and that therefore it is vital that large purchases of certain commodities be made by allocations at fair prices." (Finding XIII, Rec. 34.)

The Secretary of War and the Secretary of the Navy agreed to this. On December 11, 1917, with their approval, the Food Purchase Board, consisting of a representative of

the War Department, the Navy Department, the Food Administration and the Federal Trade Commission, was organized, to decide from time to time which articles of food, because of shortage, should be thus procured (Finding XIII, Rec. 34), and the Food Administration was made the agency to allot the orders in such cases. (Finding XV, Rec. 35.)

In this way the Food Administration during the War came to allot orders for supplying the Army and Navy with a large number of articles of food besides bacon, including flour, sugar, butter, beef, canned meats, canned vegetables, canned fruits, canned milk and canned salmon.

The function of allotting orders for supplies for the Army and Navy was thus exercised by the Food Administration with the consent of the War Department and the Navy Department, respectively, expressed through the Food Purchase Board. In giving such consent those departments were but complying with the executive order creating the Food Administration, which directed "all departments and established agencies of the Government to co-operate with it in the performance of its duties." (Finding XII, Rec. 33.)

If any question be raised as to the authority for creating the Food Purchase Board and conferring upon it the power to decide when a commodity should be procured by "plans of allocation," there is, besides the agreement between the Food Administration and the Secretary of War and the Secretary of the Navy, the order of the President of May 8, 1918, formally authorizing "the organization of the Food Purchase Board to consist of a representative of the Secretary of War, the Secretary of the Navy, the Federal Trade Commission, and the United States Food Administration." (Finding XIII, Rec. 34.)

If, again, the President's authority be questioned, there is section 2 of the Act of August 10, 1917, authorizing him, "in carrying out the purposes of this Act, * * * to create and use any agency or agencies;" also the so-called Overman Act of May 20, 1918, authorizing him during the continuance of the War and for six months after the proclamation of peace "to make such redistribution of functions among executive agencies as he may deem necessary," and "to trans-

fer any duties or powers from one existing department, commission, bureau, agency, office, or officer to another." "A mere reading of the [Overman] Act shows," said the Circuit Court of Appeals, Second Circuit, in a recent case, "that the President was clothed with the widest measure of discretion, so far as concerned 'matters relating to the conduct of the present war.'" (*United States v. Houston*, 273 Fed. 915, 918.)

The demonstration of the Food Administration's authority is made complete by pointing out that centralizing in its hands the allotment of orders in the case of food commodities in which there was a shortage had a direct relation to assuring an adequate supply and equitable distribution of foods, to preventing injurious speculation, to establishing and maintaining Governmental control of such necessities during the War, and to avoiding preventable loss and duplication of effort or funds—all objects of the Act of August 10, 1917, which, under the beforementioned delegation of power from the President it was the duty of the Food Administration to carry into effect.

In the case of the particular order here in question, the Food Administration's authority was yet more specific.

At a meeting of the Food Purchase Board held July 16, 1918, it was decided that because of the shortage of bacon and canned meats purchases of those products should be brought under the allotment plan. (Finding XV, Rec. 35.)

On August 12, 1918, the Acting Quartermaster General notified the Depot Quartermaster at Chicago of the impending action of the Food Purchase Board with respect to the method of procuring bacon and canned meats and instructed the Depot Quartermaster to cancel the *orders* which had been placed with the packers and to ask allotments of same from the Food Administration. (Finding XV, Rec. 35.)

Prior to this time the Depot Quartermaster at Chicago had been himself placing orders for bacon and canned meats by allotment or allocation instead of by competition, under the authority of War Department General Orders No. 49 declaring an emergency. (Finding IX, Rec. 31-32; Finding III, Rec. 27.)

On November 26, 1918, the Depot Quartermaster at Chicago, acting under the beforementioned advices from the Acting Quartermaster General, requested the Food Administration to allot to Swift & Company an order for serial 10 or canned bacon for delivery in specified quantities in the months of January, February and March, 1919. (Finding XVI, Rec. 37.)

It was in response to this request, and in exact conformity therewith, that the order of December 3 was allotted to Swift & Company by the Food Administration. (Finding XVI, Rec. 38.)

It is thus beyond dispute, *first*, that under the statute and executive orders creating it and defining its powers and duties, the Food Administration had authority to act for the War Department in allotting or allocating orders for food supplies during the War, at least when so requested by the War Department; and, *second*, that the particular order of December 3 was allotted to Swift & Company by the Food Administration at the specific request of the War Department.

Orders so allotted by the Food Administration and other war agencies, when accepted, were treated by the War Department as contracts, the same as if they had been allotted by officers of the War Department itself.

(a) In passing upon the application made to him in this case for relief under the Dent Act, the *Secretary of War held that the very series of offers by Swift & Company and other packers and corresponding allotment orders by the Food Administration here in controversy constituted contracts*, although relief was denied on the ground that no contract was concluded prior to November 12, 1918, as the Dent Act requires. His opinion states:

"By the custom which had obtained in these dealings these statements from the packers had come to be called 'tenders,' which they were in fact, and the acceptance of the tenders in previous cases, followed by allotment orders from the Food Administration, *constituted contracts* which were performed

by the packers on the one side and the Government on the other." (Dees. App. Sec. War Dept. Cl. Bd., Vol. VII, pp. 167, 168.) [Italics ours.]

(b) In the letter dated August 12, 1918, notifying the Depot Quartermaster that thereafter orders for bacon and canned meats would be allotted by the Food Administration, the Acting Quartermaster General instructed the Depot Quartermaster "to cancel *orders* which had been placed with the packers and ask allotments of the *same* from the Food Administration." (Finding XV, Rec. 35.) It cannot be supposed that at the very crisis of the War, the War Department would have cancelled the orders already placed, for food supplies in which there was a shortage, unless it had construed as equally binding upon the packers the orders allotted by the Food Administration which it accepted in substitution.

(c) In the letter from the Depot Quartermaster to the Food Administration dated November 26, 1918, asking that allotments be made to cover the Army's requirements for bacon and canned meats for the first three months of 1919, the request was made—"that packers be informed at the earliest practicable date allotments made to them, in order that they can make necessary arrangements for the procurement of tins, boxes, and other equipment, as well as to know the quantities of green product it will be necessary for them to put in cure during December to apply on later deliveries" (Rec. 38), showing that the packers were expected to treat these allotment orders as definite orders and proceed to fill them.

(d) In the Fall of 1918 after the Armistice the question arose whether allotment orders of the Food Administration for canned vegetables of the 1918 pack (Canned Foods Bulletins Nos. 10 and 12) imposed upon the War Department any obligation to settle for that portion of the product reserved for the Army by canners in compliance with such directions with respect to which no purchase order or contract had been executed by the War Department. The War De-

partment held that such an obligation existed and made settlements accordingly. (Claim of *Winfield Webster & Co.*, Case No. 478, Dees. War Dept. Bd. Cont. Adj., Vol. III, pp. 10, 11, 15.)

The decision states:

"The basis of this original agreement is the Canned Foods Bulletin No. 12, of the United States Food Administration, Division of Coordination of Purchase, dated September 27, 1918, which was issued to the canning industry and served on Roberts & Co. as the authorized representatives of claimants. This bulletin contains the statement that the requirements of the Army, Navy, and Marine Corps are placed at 45 per cent of the total 1918 pack and contains the following words: 'The Army, Navy, and Marine Corps guarantee to take, and you are hereby directed to hold, the above percentage of your pack.' It appears from the evidence in this case that in issuing these directions to the claimants, the Food Administration acted as the agent of the War Department as respects the total amount of tomatoes involved in this claim. This appears from the language of the bulletin itself, and is confirmed by the action of the War Department which followed with relation to these claimants."

* * * * *

"The authority of the Food Administration to make an agreement on behalf of the War Department with claimants covering all of the tomatoes involved in this claim and the fact that such an agreement was made would, therefore, appear to be clearly established." (P. 15.)

(e) In the case of the *Lackawanna Steel Co.*, No. 336, the War Department Board of Contract Adjustment held that an order for steel allocated by the War Industries Board through the sub-committee on steel distribution of the American Iron and Steel Institute, at the request of the Ordnance Department, under circumstances almost identical with those in the present case, created a contractual relation. (Dees. War Dept. Bd. Cont. Adj., Vol. I, p. 740.) The allotment

order there in question is set forth in the margin below¹ in order that its similarity to the one involved in the present case may be noted. The following observations made by the War Department in reaching its decision are equally applicable to the present case:

"11. The evidence also tends to show that the steel producers for the most part accepted these apportionments without protest, and upon patriotic motives to the end that the whole steel industry of the United States should be coordinated to meet the Nation's demands; that it was well understood among the steel producers that a gigantic program of munition production was under way for the 1919 campaign in France, and that steel producers generally were working together with the Government with the one end

"SHELL STEEL DISTRIBUTION, ITEM No. 227.

WILKINS BUILDING,

Washington, D. C., September 23, 1918

"LACKAWANNA STEEL COMPANY,

"Mr. C. R. Robinson, General Manager of Sales,
Buffalo, N. Y.

"DEAR SIR: The subcommittee on steel distribution apportions the Lackawanna Steel Company the following shell steel tonnage:

Net tons.	Description.	Forging maker.	Delivery.
124,200	82 mm rounds class "B".	Symington Machine Corp., Rochester, N. Y.	0,936 tons monthly from January, 1919, to May, 1919; 12,420 tons monthly from June, 1919, to November, 1919.

"Recommendations in line with the foregoing have been passed to the War Industries Board, and we understand you will complete your negotiations with Army Ordnance in the usual manner.

"Yours, very truly,
(Signed) JAS. B. BONNER,
Vice Chairman." (Ibid., p. 742.)

in view of meeting, promptly and fully, the requirements of that program.

"12. It was further shown at the hearing that the Lackawanna Steel Co. began preparation for production upon receiving the formal allocations through the American Iron and Steel Institute without waiting for procurement orders from the Ordnance Department, or for the execution of formal contracts, and that such was the general custom at that stage of the war among steel producers because of the urgency for production and rapid delivery." (*Ibid.*, p. 746.)

(f) Similarly, in the following additional cases, orders given by the War Industries Board for the use and benefit of the War Department were conceded by the War Department itself to have contractual effect: Case No. 90, *Claim of S. Stroock & Co.*, Decs. War Dept. Bd. Cont. Adj., Vol. III, p. 359; Case No. 178, *Claim of Frank L. Young Co.*, *Ibid.*, Vol. III, pp. 495, 497; Case No. 2748, *Claim of Eastern Steel Co.*, *Ibid.*, Vol. VI, pp. 612, 616.

The foregoing official acts and rulings of the War Department constitute an administrative construction which in accordance with the settled rule should be followed unless clearly erroneous.

APPENDIX B.

Cases in the Court of Claims bearing on the question whether contracts entered into under authority of Revised Statutes, § 3709, in times of public exigency, are subject to Revised Statutes, § 3744, requiring contracts with the War, Navy and Interior Departments to be reduced to writing, etc.

Most of the early cases involved contracts made under Section 4 of the Act of July 4, 1864 (13 Stat. 396), providing that "when an emergency shall exist requiring the immediate procurement of supplies for the necessary movements of an army or detachment," it shall be lawful for the

Commanding Officer to order the procurement of such supplies "in the most expeditious manner, and without advertisement." The full text of the section is reproduced in the margin below.¹ While more limited in scope the analogy between this provision and Section 3709 is obvious.

In *Wentworth's Case*, 5 Ct. Cl. 302, recovery was sought on certain contracts made by the Navy Department for boiler felting. The Government defended on the ground, amongst others, that the Act of June 2, 1862 (R. S., § 3744), requiring contracts made by the Navy Department to be in writing and signed by the contracting parties had not been complied with. A public exigency had been declared by the proper officers, and the claimant relied upon the Act of March 2, 1861 (R. S., § 3709), providing that when immediate delivery or performance is required by a public exigency Government contracts may be made in the manner usually obtaining between individuals; and also upon the Act of July 4, 1864. The court held that the claimant was entitled to recover under these Acts, excepting as to one of the contracts in respect to which the court appears to have held that no exigency existed.

In *Travers v. United States*, 5 Ct. Cl. 329, the Court held that, "A commanding officer in an emergency might authorize the purchase and procurement of supplies, etc., without advertising for proposals, and without a written con-

¹ SEC. 4. *And be it further enacted*, That when an emergency shall exist requiring the immediate procurement of supplies for the necessary movements and operations of an army or detachment, and when such supplies cannot be procured from any established depot of the quartermaster's department, or from the head of the division charged with the duty of furnishing such supplies, within the required time, then it shall be lawful for the commanding officer of such army or detachment to order the chief quartermaster of such army or detachment to procure such supplies during the continuance of such emergency, but no longer, in the most expeditious manner, and without advertisement; and it shall be the duty of such quartermaster to obey such order; and his accounts of the disbursement of moneys for such supplies shall be accompanied by the order of the commanding officer as aforesaid, or a certified copy of the same, and also by a statement of the particular facts and circumstances, with their dates, constituting such emergency.

tract," citing, 12 Stat. L., p. 220, now Revised Statutes, § 3709. (P. 335.) [Italics ours.]

In *Wilcox's Case*, 5 Ct. Cl. 386, the court permitted recovery on an emergency contract within the purview of the Act of July 4, 1864, but not reduced to writing and signed by the parties.

In *Cobb, Christy & Company's Case*, 7 Ct. Cl. 470, the court sustained an action for damages for failure of the United States to accept supplies orally contracted for in time of emergency. The court referred to the Act of June 2, 1862 (R. S., § 3744), requiring contracts made by the War, Navy and Interior Departments to be in writing and signed by the parties and copies filed in the Returns Office within thirty days, together with all bids, offers and proposals, and then said:

"These detailed provisions show that the statute is made in reference to the ordinary business of the Department specified, and not to the special emergency contemplated in the 4th section of the statute of the 4th of July, 1864, and which existed when these contracts were made, * * *." (P. 480.)

In both *Updegraff's Case*, 8 Ct. Cl. 514, and *Thompson's Case*, 9 Ct. Cl. 187, the contracts sued upon were held to be emergency contracts within Section 4 of the Act of 1864 and recovery was permitted although they did not meet the requirements of the Act of June 2, 1862 (R. S., § 3744).

Thus in the first five cases in which the issue was presented this Court held that emergency contracts were enforceable against the United States although not reduced to writing and signed by the parties.

In *Cobb, Blasdell & Company's Case*, 18 Ct. Cl. 514, the claimant sued on an oral contract alleged to have been made at a time of emergency within the meaning of Section 4 of the Act of 1864. The court held that "there was no lawfully declared emergency in this case." (P. 530.) After apparently disposing of the case on this ground the court proceeded to discuss the Act of 1864 in connection with the requirements of the Act of June 2, 1862 (R. S., § 3744). The court referred to the fact that in *Cobb, Christy & Company's Case, supra*, it had held that the last mentioned statute

"did not apply to contracts made in an emergency and [had] sustained a verbal contract in every respect like the one now in suit." (P. 533.) It then went on to say that since that decision the Supreme Court in *Clark's Case*, 95 U. S. 539, had held the Act of June 2, 1862 (R. S., § 3744), to be mandatory, and added:

"As the Supreme Court except nothing from the operation of the Act, but expressly says that its language is equivalent to preventing any other mode of making contracts, we feel ourselves constrained to reverse the former ruling of this Court, * * *." (P. 533.)

The question whether Section 3744 applies to contracts made in an emergency was not decided or even discussed, however, in *Clark's Case*. The language of an opinion must always be limited to the circumstances of the case presented for decision.

In the *Pacific Steam Whaling Company's Case*, 36 Ct. Cl. 105, the Court returned to its first view that Section 3744 does not apply to contracts made in an emergency. The claim there was based on a contract made by the War Department for the transportation of reindeer and supplies between points in Alaska. The contract was made under authority of an Act of Congress appropriating \$200,000 "to be expended (or so much thereof as may be necessary) in the discretion and under the direction of the Secretary of War for the purchase of subsistence stores, supplies, and materials for the relief of people who are in the Yukon River country or other mining regions of Alaska, and to purchase transportation and provide means for the distribution of such stores and supplies." (Act, Dec. 18, 1897, 30 Stat. 226.) The contract was not reduced to writing as required by Section 3744. On the first trial the claimant sought recovery on a *quantum meruit* but was denied relief on that theory as the court found that the Government had not profited by what the claimant had done under the contract. (P. 108.) A new trial was granted and in that the claimant based its right, as stated by the Court, "upon the further ground that the contract is binding on the defendants, although not in writing and signed by the respective parties as required by

certain sections of the Revised Statutes, and in support of that theory of the law directs the court's attention to Section 3709." (P. 108.) The Court granted relief on this theory, quoting Section 3709 and holding that the very nature of the subject matter of the Act authorizing the contract indicated the existence of an emergency. (P. 108.) The opinion concludes as follows:

"Upon reargument and the question of the emergency of the situation being presented, it is the judgment of the court that the former judgment is hereby set aside, * * *." (P. 109.)

This decision was cited with approval in *Moran Brothers Co. v. United States*, 39 Ct. Cl. 486, 493. In the last mentioned case the claim grew out of a contract by the War Department for the purchase of a vessel. The contract was not reduced to writing and signed by the parties as required by Section 3744 of the Revised Statutes. The Court found, however, that—

"The public exigency required the immediate purchase, completion, and alteration of said steamer in order that she might be ready for the service in the Army in Alaska immediately upon the opening of navigation in Bering Sea." (Pp. 487-488.)

It therefore held that—

"The transaction in this proceeding was under the Revised Statutes, Section 3709, which obviates the necessity of reducing the contract to writing. The condition needed celerity of movement and comes within the law which provides for exigencies of situations." (P. 493.)

The Court also held that the claimant was entitled to recover on a *quantum meruit*.

In *Johnston v. United States*, 41 Ct. Cl. 76, recovery was sought on an alleged verbal contract growing out of what the court described as "a somewhat indefinite interview between the claimant and an Army officer." (P. 81.) The Court found it to be "very doubtful whether there was any such

verbal contract." (P. 81.) As a further ground for denying relief, however, it stated (pp. 81-82) :

"If it is admitted that the circumstances of this case made an emergency contract permissible within section 3709, Revised Statutes, it has been frequently¹ decided that that section only relieves from the necessity of advertising for proposals in cases of public exigency, and does not relieve from the necessity of having such contracts in writing. (*Cobb v. United States*, 18 Ct. Cl. R., 514; *Clark v. United States*, 95 U. S. R., 539.)"

This was a departure from the previous decisions of the court, and Howry, J., dissented, saying (p. 85) :

"It must also be noted that the parol contract, if it be deemed such, was made by an Army officer to meet what he deemed a public exigency. Such agreements need not rest upon advertisements nor be in writing."

In *Ceballos v. United States*, 42 Ct. Cl. 318, the United States put in a counterclaim for the amount paid by it to the claimant under an oral contract on the theory that no liability could arise against the Government on a contract which did not comply with the requirements of Section 3744 of the Revised Statutes. (P. 350.) In denying the counterclaim the Court said:

"Contracts for services made in emergencies and under exigencies need not always rest upon advertisements or be in writing. (§§ 3709, 3732, Revised Statutes; *United States v. Speed*, 8 Wall. 77.) The state of affairs shown by the findings appear about as emergent as anything well could be, and the counterclaim on this point cannot be sustained." (P. 351.)

In the next paragraph of its opinion the Court again referred to "the statute authorizing parol agreements in cases of emergency." (P. 351.)

¹ We have been able to find only one such decision, *Cobb, Blasdell & Co.'s Case*, 18 Ct. Cl. 514, discussed above.

It thus appears that in nine cases the Court of Claims has recognized that emergency contracts are valid and may be enforced against the Government although not reduced to writing and signed by the parties as provided in Revised Statutes, § 3744. This was the view first announced by the Court and this is its last expression of opinion on the subject. Two cases have stated a contrary view, in the latter of which there was a dissenting opinion.

APPENDIX C.

Cases before the War Department holding that a request by a duly authorized officer for the performance of work or services, followed by entry upon performance prior to November 12, 1918, gave rise to an implied in fact agreement under the Dent Act.

(a) Case No. 598, *Claim of Sawyer Tanning Co.*, Decs. War Dept. Bd. Cont. Adj., Vol. II, p. 382.—In March or April, 1918, the claimant was requested to manufacture cow-hides into glove leather to the extent of the capacity of its plant, which it proceeded to do. (P. 382.) It was assured that its entire output would be taken by the Government. (P. 383.) On November 12 the claimant was notified to stop production. (P. 383.) This left on its hands 571,333 square feet of this leather which had to be disposed of at a loss. (P. 383.) It was held that the request to claimant to produce cowhide glove leather to the extent of its capacity and the claimant's compliance constituted an implied agreement within the meaning of the Dent Act under which the claimant was entitled to reimbursement for its loss. (P. 384.)

(b) Case No. 1560, *Claim of Briggs & Stratton Co.*, Decs. War Dept. Bd. Cont. Adj., Vol. II, p. 789.—In October, 1918, when the claimant had about completed performance of a contract for 2,500,000 grenades, it was requested, in order that production could go forward without interruption, to obtain materials for the manufacture of 3,000,000 more which it had bid for, but for which no order had yet been

given. (Pp. 790-791.) Thereafter it was instructed to proceed with production. No order or contract was ever executed, however. (P. 792.) It was held that the request to claimant to go ahead with the manufacture of 3,000,000 grenades and its compliance constituted an agreement under the Dent Act, and a claim for losses incurred in acting on the request was allowed. (P. 393.)

(c) Case No. 1674, *Claim of C. H. Cowdrey Machine Works*, Decs. War Dept. Bd. Cont. Adj., Vol. III, p. 135.—On October 10, 1918, a procurement officer in the Ordnance Department instructed the claimant "to proceed with the manufacture of 1,342 additional recoil mechanisms for 37-mm. tractor guns modified for tanks," stating that an order or contract would follow. (P. 136.) In reliance upon this request the claimant incurred expenses for tools, machines and material. (P. 137.) The armistice came and with it a notice to stop production before any order or contract had been executed beyond the beforementioned request made by Major Nichols. It was held that that request constituted an agreement within the meaning of the Dent Act, and the claimant was awarded reimbursement for the losses incurred by it in preparing to manufacture the articles in question. (P. 139.)

(d) Case No. 1601, *Claim of the Susquehanna Webbing Co.*, Decs. War Dept. Bd. Cont. Adj., Vol. III, p. 629.—Early in 1918 the claimant had been requested to keep up continuous capacity production of webbing for the Army (p. 631), and from time to time orders for specific quantities were placed with it. (Pp. 629-630.) On November 5, 1918, it was tendered an order for 300,000 yards, which it accepted on November 12. (Pp. 630-631.) On November 14 it was notified to stop production (p. 630), but in the meantime and prior to November 12 it had incurred expenditures for which it claimed reimbursement. Since the Dent Act only applies to agreements made prior to November 12, 1918, no relief could be granted unless, as the opinion of the War Department states, "there is some further element in the situation which placed the claimant under obligation to proceed before November 12, 1918, * * *." (P. 631.) It was

held that this further element existed in that long prior to November 12 an agreement within the meaning of the Dent Act was created by the request made upon the claimant for continuous capacity production and the claimant's compliance therewith. (Pp. 631-632.) The decision is thus stated in the headnote:

"Where it was understood between the contractor and the Government that production was to be continuous, and that the Government would take all the goods the contractor could produce, the latter is justified in proceeding without waiting for the formal contract." (P. 629.)

(e) Case No. 502, *Claim of National Vaccine and Antitoxin Institute*, Decs. War Dept. Bd. Cont. Adj., Vol. IV, p. 277.—At a meeting held June 2, 1918, Major Bull, representing the Medical Corps of the War Department, requested the petitioner and others present to manufacture tetanus antitoxin for the War Department, "and assured the petitioner and the other manufacturers present that the Government would take all of this new antitoxin that could be produced, and that the need for it was urgent." (P. 278.) Following this meeting a representative of the petitioner went to see Colonel Wolfe, also of the Medical Corps, "with a view to fixing upon some amount of the new antitoxin to be manufactured." (P. 278.) Colonel Wolfe said that "although the Government had not formulated its plan for the purpose of determining the amount, and did not know the size of a dose, they would take all that petitioner could produce." (P. 278.) Petitioner thereupon made preparations for the manufacture of the new antitoxin, incurring expenses in that behalf. Work was stopped by the armistice, and the petitioner filed its claim under the Dent Act for reimbursement. The War Department allowed the claim, saying:

"Under the facts of this case, as developed at the last hearing, this Board is now of the opinion that at the conference on June 2, 1918, *an implied agreement was entered into from the assurances made by Major Bull, and afterward ratified by Colonel Wolfe * * **." (P. 279.) [Italics ours.]

(f) Case No. 413, *Claim of Casco Tanning Co.*, decided April 28, 1920, Decs. War Dept. Bd. Cont. Adj., Vol. V, p. 79.—On or about May 22, 1918, the claimant was requested by an officer of the Quartermaster Corps to manufacture all the leather of a certain kind that it could for Army shoes and was told that the Government would find purchasers for all such leather that it manufactured. (P. 80.) The claimant proceeded to comply with this request. (P. 80.) Subsequently it was notified to manufacture no more leather of this kind except what was already in process. (Pp. 80-81.) What was in process was completed. (P. 81.) The claimant was thus left with a quantity of this leather on hand, which could not be disposed of except at a loss, not being a commercial product. (P. 81.) It was held that "an agreement was thereby implied between the Government and claimant whereby the Government agreed to reimburse claimant for the loss necessarily and reasonably sustained by it on account of the bark-tanned leather so left on its hands which it was unable to sell." (P. 83.)

(g) Case No. 492, *Claim of J. Lichtman & Son*, decided May 5, 1920, Decs. War Dept. Bd. Cont. Adj., Vol. V, p. 221; Case No. 309, *Claim of Cleveland Tanning Co.*, decided May 6, 1920, Ibid., Vol. V, p. 226; Case No. 464, *Tolman, Dow & Co.*, decided May 8, 1920, Ibid., Vol. V, p. 267; Case No. 323, *Claim of Albert Trostel & Sons Co.*, decided May 12, 1920, Ibid., Vol. V, p. 309; Case No. 327, *Claim of Green & Hickey Leather Co.*, decided May 21, 1920, Ibid., Vol. V, p. 649; Case No. 576, *Claim of Graton & Knight Manufacturing Co.*, decided May 1, 1920, Decs. War Dept. Bd. Cont. Adj., Vol. VI, p. 764; Case No. 3029, *Claim of Widen-Lord Tanning Co.*, decided February 19, 1921, Decs. War Dept. Bd. Cont. Adj., Vol. VIII, p. 608.—In each of these seven cases, as in the preceding case, the claimant was requested by an officer of the Quartermaster Corps to manufacture as much leather of a certain kind as it could and was told that the Government would take its entire output. It was held in each that an implied agreement arose under which the claimant was entitled to recover compensation for the losses sustained in disposing of the leather which it had on hand or in process

of manufacture when notice to stop production was received from the Government.

(h) Case No. 642, *Claim of Foster & Stewart Co.*, decided May 8, 1920, Decs. War Dept. Bd. Cont. Adj., Vol. V, p. 272.—Claimant, which had a formal contract with the War Department for the manufacture of 250,000 yards of duck, was requested not to sell the further output of its looms without offering it to the Government. Accordingly, when its formal contract was nearing completion, an officer of the claimant inquired of the procurement officer what to do. He was asked what deliveries could be made and replied “that deliveries could be made at the rate of 25,000 yards per week.” (P. 272.) He was then told, “You go ahead and purchase your yarns and start deliveries.” (P. 273.) No total quantity or price was at that time agreed upon. A few days later the procurement officer wrote that he had “recommended” that a mandatory order be issued to the claimant for a total of 300,000 yards at a price to be fixed by the Board of Appraisers, delivery to begin September 15. No such order was ever issued, however. (P. 274.) It was held that the instruction to the claimant to go ahead and prepare to make deliveries at the rate of 25,000 yards per week when acted on by the claimant gave rise to an agreement under the Dent Act under which the claimant was entitled to reimbursement for losses incurred. (P. 274.)

(i) Case No. 1878, *Claim of American Sponging Co.*, decided May 15, 1920, Decls. War Dept. Bd. Cont. Adj., Vol. V, p. 387.—An officer of the Quartermaster Corps requested the claimant to equip itself with the necessary plant and machinery for shrinking and measuring cloth and promised it a contract for all the work of that kind which it could do until a year from July 1, 1918. In November, 1918, following the Armistice, it was notified that there was no more work for it to do. (P. 389.) Its equipment not being suitable for civilian work it went out of business with a loss on its hands as a result of the shortening of the period for which it was promised work. It was held that the request to the claimant to install equipment for shrinking and measuring

cloth, coupled with the promise that if it did so it would be given all the work it could do for a stated period, and claimant's compliance with the request, created an implied agreement under which the claimant was entitled to reimbursement for the loss sustained by reason of the failure of the Government to engage the claimant's services for the full length of time promised. (Pp. 390-391.)

(j) Case No. 1949, *Claim of Harriman Industrial Corporation*, decided May 17, 1920, Decs. War Dept. Bd. Cont. Adj., Vol. V, p. 463.—The claimant was requested in 1918 to engage in the manufacture of ammunition boxes. (P. 463.) The lumber for the boxes came from the far West and could not be obtained in the winter months. (Pp. 463-464.) In order to avoid any break in production for lack of lumber, the officer in charge of the procurement of ammunition boxes, on July 20, 1918, directed the claimant to procure 1,500,000 feet of western pine, which it did. (P. 464.) Before any of the lumber was made into boxes the Armistice intervened and the manufacture of boxes was stopped. (P. 464.) It was held that the claimant was entitled to reimbursement for the difference between what it paid for lumber bought at the Government's request and what it could sell it for. (P. 464.)

(k) Case No. 2213, *Claim of Langrock Brothers & Co.*, decided May 22, 1920, Decls. War Dept. Bd. Cont. Adj., Vol. V, p. 688.—In October, 1918, the claimant was requested to bid on 200,000 grenade carriers, which it did. (P. 689.) It was informed over the telephone by an officer of the Quartermaster Corps that it "would be awarded the contract," and was instructed to "get ready for production." (P. 689.) A few days later in a conversation with the sales manager of the claimant company the same officer increased the quantity to 300,000 and said, "You can go right ahead on your production." (P. 689.) A few days after that the same officer, desiring to increase the quantity still further, wrote the claimant, "I am authorized by the Director of Purchase to advise you that this office contemplates awarding you contract for 350,000 grenade carriers," and that the contract was being prepared and would be forwarded "as soon as

necessary approval can be secured." (P. 690.) On December 4, 1919, the Armistice having intervened, claimant was notified that the contract would not be executed. (P. 690.) In the meantime, however, it had made expenditures on the strength of the request of the officer of the Quartermaster Corps to go right ahead with production. (P. 691.) It was held that this request and compliance therewith by the claimant gave rise to an agreement within the meaning of the Dent Act, under which the claimant should be compensated for its losses. (P. 692.)

(l) Case No. 43, *Claim of Burdette Manufacturing Co.*, decided June 15, 1920, Dees. War Dept. Bd. Cont. Adj., Vol. VI, p. 317.—The claimant, while negotiating for a contract to supply the War Department with 400,000 mopheads, bought for that purpose 500,000 pounds of yarn under instructions from the officer with whom it was negotiating "to go and get covered." (Pp. 319, 325.) The claimant was awarded a contract for only 288,000 mopheads. It was held entitled to recover for the losses it incurred in preparing at the request of the Government to manufacture the larger number. (P. 326.)

(m) Case No. 710, *Claim of A. Ziegler & Sons Co.*, decided April 15, 1920, Dees. War Dept. Bd. Cont. Adj., Vol. VI, p. 742.—While negotiating for a contract to supply the War Department with 250,000 yards of webbing, the claimant was told by the officer with whom it was negotiating "to secure the yarn [the raw material] and that the order would come along * * * in due course." It thereupon purchased 12,392 pounds of yarn. (P. 744.) A contract was prepared by the Ordnance Department but was never executed, the claimant alleging that it did not conform with the specifications agreed upon in the negotiations. (P. 743.) It was held that there was an agreement within the purview of the Dent Act under which the claimant was "entitled to be reimbursed for such losses as it may have reasonably sustained by reason of its purchase of material with which to enter into the performance of the contract." (P. 745.)

(n) Case No. 2852, *Claim of W. D. Ham*, decided September 7, 1920, Dees. App. Sec. War Dept. Cl. Bd.,¹ Vol. VII, p. 556.—The claimant was requested by an officer of the Ordnance Department to buy as much walnut lumber as possible for manufacture into gunstocks. (Pp. 556-557.) He did so and at the time of the Armistice had engaged himself to buy 1,823,850 feet. (P. 557.) The Ordnance Department obtained the release of the claimant from these engagements but he still stood to lose his expenses. It was held that out of the request to the claimant to buy walnut lumber and his compliance there arose "an informal agreement within the terms of the Act of March 2, 1919, whereby the Government became obligated to reimburse him for expenditures made upon the faith of same in securing contracts for 1,823,850 feet of walnut lumber." (P. 557.)

(o) Case No. 2220, *Claim of Sager & Sloteroff*, decided September 20, 1920, Dees. App. Sec. War Dept. Cl. Bd., Vol. VII, p. 649.—The claimants were requested to prepare themselves for the manufacture of 96,000 overseas caps, which they did, and were told that they would receive a formal contract in a few days. No such contract was ever executed, however. It was held that the request and compliance therewith gave rise to an agreement under the Dent Act under which the claimants were awarded compensation for their losses.

(p) Case No. 194, *Claim of Alcohol Products Co.*, decided November 9, 1920, Dees. App. Sec. War Dept. Cl. Bd., Vol. VIII, p. 114.—The claimant received orders from time to time during the War for the manufacture of metahyl acetate for the Government. This article was made from acetate of lime and it was the practice of the War Industries Board to see that manufacturers of metahyl acetate had on hand sufficient acetate of lime to fill anticipated orders. In accordance with that practice on October 18, 1918, the War Industries Board directed one of the producers of acetate of lime to ship 150 tons to the claimant. The War Industries

¹ Successor to Board of Contract Adjustment.

Board "expected and tacitly required" the claimant to purchase this material in expectation that orders would be given the claimant for the manufacture of metahyl acetate sufficient to use it up. In accordance with this request or "tacit requirement" the claimant purchased the material, a portion of which was left on its hands after the Armistice when the manufacture of metahyl acetate was stopped. It was held that out of the request to purchase this material and compliance therewith "an implied agreement arose between the Government and claimant, whereby the Government agreed either to give claimant sufficient orders for metahyl acetate as would require the use of the acetate of lime directed to be shipped to claimant * * *; or in case subsequent orders were not issued for metahyl acetate requiring the amount of acetate of lime previously shipped, then the Government would take the acetate of lime so shipped to claimant which was not required to fill Government orders for metahyll acetate and relieve claimant from any loss on account of such shipments." (Pp. 119-120.)

(q) Case No. 1779, *Claim of Pfau Manufacturing Co.*, decided November 29, 1920, Dees. App. Sec. War Dept. Cl. Bd., Vol. VIII, p. 213.—The claimant had a contract for the manufacture of plane tables for the War Department which was nearing completion. It informed the procurement officer that unless it received further contracts from the Government it would be compelled to let its experienced help go and sever its arrangements for obtaining component parts. Whereupon the procurement officer said, in substance, "Order material, keep your men on, keep your women on and do not let them go because we are going to look to you for making these things." (P. 217.) It was held that this request and compliance therewith by the claimant created an agreement under the Dent Act. (P. 217.)

The construction of the Act embodied in this series of rulings by the department of the Government charged with its administration—that under it contractors who, prior to November 12, 1918, entered upon performance at the request of the United States before definite terms had been

arrived at as to price or quantity, are entitled to "a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform"—would be persuasive in any event. (*United States v. Hermanos y Compania*, 209 U. S. 337, 339; *United States v. Hammers*, 221 U. S. 220, 228; *La Roque v. United States*, 239 U. S. 62, 64.) Fortified by the fact that it is in exact accord with the purpose of Congress as authoritatively stated in the report of the committee in which the legislation originated (*ante*, 112), the correctness of this construction is put beyond question.

(8188)



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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1925.

No. 288

THE UNITED STATES, APPELLANT,
v.
SWIFT & COMPANY.

No. 289

SWIFT & COMPANY, APPELLANT,
v.
THE UNITED STATES.

ON APPEAL AND CROSS APPEAL FROM THE COURT OF CLAIMS.

REPLY MEMORANDUM FOR SWIFT & COMPANY.

CONTENTS.

	Page
I. Concerning the contention that the cured or salt bellies should not have been resold in Europe.....	1-3
II. Concerning the contention that there was no sufficient ten- der of the March instalment.....	3-5
III. Concerning § 120 of the National Defense Act.....	5
IV. Concerning the Dent Act.....	5

CASES CITED.

Behrends v. Beyschlag, 50 Neb. 304.....	3
Bruce v. Smith, 44 Ind. 9.....	3
Clark v. Weis, 87 Ill. 441.....	3
Cook v. Daggett, 2 Allen, 441.....	3
Jackson v. Allaway, 6 M. & Gr. 942.....	3
Manistee Lbr. Co. v. Bank, 143 Ill. 490, 502.....	3
Mount v. Lyon, 49 N. Y. 552.....	3
Ohio & Miss. Ry. Co. v. McCarthy, 96 U. S. 258, 267-268.....	5
Smith v. Lewis, 26 Conn. 90.....	3

TEXT BOOKS CITED.

2 Williston on Contracts, § 743, pp. 1414-1415.....	5
3 Williston on Contracts, § 1819, p. 3135.....	5

STATUTES CITED.

National Defense Act, § 120 (Act of June 3, 1916, c. 134, 30 Stat. 166, 213).....	5
Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272).....	5

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REPLY MEMORANDUM FOR SWIFT & COMPANY.

I.

**Concerning the contention that the cured or salt bellies
should not have been resold in Europe.**

Replying to our contention (Point XI, Swift & Co.'s Main Br., pp. 155-163), that the judgment should be modified by including the amount of the loss sustained by Swift & Com-

pany on the 1,003,313 pounds of cured or salt bellies resold in European markets, the Government says that "the distressing condition of European affairs, both commercial and financial," made this a speculative adventure. (Government's Reply Br., p. 4.)

It is easy now to characterize the transaction in that way, but that is not the way it appeared *at the time*, either to Swift & Company or to the Government. And that is the test.

These bellies were a kind of product which Swift & Company had sold in European countries before (Finding XXX, Rec. 52), and *at that time* it had every reason to believe that it would find a better market there than at home, because of the shortage of food products in Europe as a result of the war, especially pork products, and the unloosing by the Armistice of the long pent-up demand for such products. (Swift & Co.'s Main Br., p. 156.)

And the Government *at that time* was issuing bulletins informing the business public that—

"Every pound of pork products we can export before next July, Europe will need."

"The European markets are opening rapidly to free trading in hog products, and the area to be supplied is being made increasingly accessible."

"For the staple food and fiber products grown in the United States, such as wheat, *meat*, sugar, cotton, and wool, there will prevail a strong demand, and prices will probably continue steady and at a high level." (See Swift & Company's Main Br., pp. 161-162.)

The Government's reply brief also mentions the fact that 417,881 pounds of these cured or salt bellies were allowed to

remain in cure for from 78 to 86 days. (P. 2.) The Court expressly found, however, that "when withdrawn from cure in April they were in good condition." (Finding XXIV, Rec. 46.)

II.

Concerning the contention that there was no sufficient tender of the March instalment.

The Government's reply brief apparently does not dispute that tender of delivery of the March instalment would have been the legal equivalent of actual delivery (p. 13), but it maintains that there was no sufficient tender.

It then discusses the question as if tender of performance by the seller under a contract of sale is of the same character and has to be made with the same technical precision as tender of payment of money due.

Of course, there is a distinction between the two. (*Smith v. Lewis*, 26 Conn. 90; *Clark v. Weis*, 87 Ill. 441; *Manistee Lumber Co. v. Bank*, 143 Ill. 490, 502; *Cook v. Daggett*, 2 Allen 441; *Mount v. Lyon*, 49 N. Y. 552; *Bruce v. Smith*, 44 Ind. 9; *Behrends v. Beyschlag*, 50 Neb. 304; *Jackson v. Allaway*, 6 M. & Gr. 942.)

The distinction is well stated in *Smith v. Lewis*, 26 Conn. 90, where the Court said:

"Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word 'tender,' as used in such a connection, does not mean the same kind of offer as when it is used with reference to the payment

or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it and nothing further remains to be done, but the transaction is completed and ended; but *it only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness.* Such readiness, ability, and notice are sufficient evidence of, and indeed constitute and imply an offer or tender in the sense in which those terms are used in reference to the kind of agreements which we are now considering." (P. 96.) [Italics ours.]

But even in the strictest sense the tender in the present case was sufficient. It was made in a series of letters to the Depot Quartermaster at Chicago dated March 7, March 14, and March 22, 1919, the substance of which is set forth in Finding XXV. (Rec. 46-47.)

The Government's contention that the tender was insufficient is based principally upon the fact that Swift & Company's letter of March 22 stated that the bacon in question was "*practically* all packed and ready for delivery." It argues from this that "there was no final completion of the contract at the time of the alleged tender." (Government's Reply Br., p. 11.) In order, however, for the tender of delivery to have been sufficient it was not necessary that the last nail should have been driven in the boxes.

In any event the objection to the sufficiency of the tender must have been made at the time in order to be effective. No such objection *was* made at the time. It is now too late

to make it. (*Ohio & Miss. Ry. Co. v. McCarthy*, 96 U. S. 258, 267-268; 2 Williston on Contracts, § 743, pp. 1414-1415; 3 Williston on Contracts, § 1819, p. 3135.)

III.

Concerning § 120 of the National Defense Act.

The only answer which the Government's reply brief makes to our contention based on § 120 of the National Defense Act was anticipated and met in our main brief. (Point V, pp. 86-96.)

IV.

Concerning the Dent Act.

Replying to our contention based on the Dent Act, the Government's reply brief first assumes that this was based "upon an alleged contract to take capacity from Swift & Company arrived at in a conference *on November 9, 1918*," and then concludes that there could have been no such contract because immediately afterwards Swift & Company offered the Depot Quartermaster 21,500,000 pounds of bacon, while the latter requested delivery of only 17,500,000 pounds. (P. 15.)

Both the assumption and the conclusion are mistaken.

The informal agreement for Swift & Company's continuous capacity production of Army bacon upon which we rely for relief under the Dent Act was entered into *early in 1918*. It so appears from the findings of the Court below. (See Swift & Co.'s Main Br., pp. 106-107.)

Nor is the fact that at a given time the Government took less than capacity production any evidence that no agree-

ment for capacity production existed, because, of course, under that agreement, as found by the Court below, the Government had the right to reduce the quantity or stop production altogether by due notice. (See Swift & Co.'s Main Br., p. 108.)

Respectfully submitted,

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Of Counsel.

November 25, 1925.

(8381)

(1) Office Supreme Court, U. S.

F I L E D

MAR 9 1925

W.M. R. [REDACTED]

IN THE

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, [REDACTED] 1925

No. [REDACTED] 288

THE UNITED STATES, APPELLANT,

v.

SWIFT & COMPANY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

REPLY TO APPELLANT'S MOTION TO REMAND THE CASE
FOR FURTHER FINDINGS OF FACT AND TO HAVE INCOR-
PORATED IN THE RECORD CERTAIN MOTIONS FOR
AMENDED AND ADDITIONAL FINDINGS AND FOR A NEW
TRIAL.

G. CARROLL TODD,
Attorney for Appellee.

GREGORY & TODD,
Of Counsel.



CONTENTS.

	Page
Preliminary statement.....	1- 7
The requests for further findings.....	8-19
Requests I, II, III, and IV.....	8-16
Requests V, VI, and VII.....	16-19
The request to have incorporated in the record the Government's motion of May 13, 1924, for amended and additional findings and for a new trial, and its motion of October 13, 1924, pursuant to Section 1088, Revised Statutes, for a new trial on the ground of newly-discovered evidence.....	19-21
Conclusion	22

CASES CITED.

American Smelting & Refining Co. v. United States, 259 U. S. 75, 79.....	5, 6
Baltimore & Ohio R. R. Co. v. United States, 261 U. S. 592... 7, 11, 14	
Brown v. District of Columbia, 127 U. S. 579, 583.....	6
Clark's Case, 95 U. S. 538.....	14
Floyd's Acceptances, 7 Wall. 666.....	10
Gulf Refining Co. v. United States, decided by the Court of Claims January 9, 1924.....	20
Harvey v. United States, 105 U. S. 671, 688.....	6
McClure v. United States, 116 U. S. 145, 151.....	11
Parish v. United States, 100 U. S. 500, 505.....	10
St. Louis Hay & Grain Co. v. United States, 191 U. S. 159....	6
United States v. Adams, 6 Wall. 101.....	17
United States v. Johnson, 6 Wall. 101.....	17
United States v. Omaha Tribe of Indians, 253 U. S. 275, 281.. 11, 21	
United States v. R. P. Andrews Co., 207 U. S. 229, 243.....	6
Young v. United States, 95 U. S. 641.....	19



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1924.

No. 920.

THE UNITED STATES, APPELLANT,
v.

SWIFT & COMPANY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

**REPLY TO APPELLANT'S MOTION TO REMAND THE CASE
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PORATED IN THE RECORD CERTAIN MOTIONS FOR
AMENDED AND ADDITIONAL FINDINGS AND FOR A NEW
TRIAL.**

Preliminary Statement.

We cannot subscribe to the statement of the case with which the Government's motion opens.

The judgment is for the amount of the loss sustained by Swift & Company in producing Army bacon ordered by the

Depot Quartermaster at Chicago, in December, 1918, for delivery in March, 1919,¹ but which was not accepted because by that time the need for it had been removed by the unanticipated rapidity of demobilization. No prospective profits are included.

Following the declaration of war against Germany, the Secretary of War, on April 12, 1917, issued an order declaring that an emergency existed within the meaning of Section 3709, Revised Statutes, and related statutes, which provide how supplies for the Government may be procured in times of emergency or public exigency. This order directed that until further notice contracts for such supplies "will be made without resort to advertising for bids." (Finding III.)

On November 17, 1917, the Food Administration, finding that the "demand for certain food commodities is greater than the supply," and that "the shortage of supplies and the aggregation of buying in such large units has effectively suspended the law of supply and demand," and that "under these circumstances [purchase] by bid and contract is not only impossible in some cases but in any event raises the general price level * * * and stimulates speculation," proposed that purchases of such commodities for the Army and Navy be made by allocating orders amongst the producers at fair prices. (Finding XIII.)

In the latter part of 1917 the Government's requirements

¹ Being the difference between the cost of production and what the product was resold for. This loss was large, *first*, because Army bacon, on account of its peculiar flavor, brought a very low price in the commercial market, and *second*, because the large surplus of Army bacon and canned meats which the end of the war left on the hands both of the War Department and the packers greatly depressed the price.

for Army bacon and canned meats had become so urgent that the Quartermaster's Department of the Army, in accordance with the foregoing recommendation of the Food Administration and under authority of the Secretary of War's order of April 12, 1917, abandoned the competitive method of procurement in the case of those commodities and instituted the plan of placing orders by allocation or allotment amongst the principal producers according to their capacity at prices based on cost of production. (Finding IX.)

The orders were placed several months in advance of the delivery dates in order to afford time for manufacture. (Finding IX.) It was impossible to tell so far in advance, however, what the cost of production would be under the conditions prevailing during the War, so the determination of a specific price was deferred until just before delivery. (Finding X.) But there was at all times an agreed standard for determining it, namely, cost of production plus a reasonable profit within the limits prescribed by the license regulations of the Food Administration. (Finding XXII.)

Early in 1918 it became apparent that the Government would require all the Army bacon and canned meats that the seven large packing companies, including Swift & Company, could produce; whereupon they were requested by the Depot Quartermaster at Chicago to produce those articles to the limit of their capacity, and there was a definite understanding that the Government would take their capacity production until further notice. (Finding XI.)

In accordance with established practice, on November 9, 1918, the Depot Quartermaster called representatives of these seven packing companies into conference to arrange for the allotment of orders to fill the Army's requirements

of bacon and canned meats for the months of January, February and March, 1919. (Finding XVI.)

Pursuant thereto, on November 12, 1918, Swift & Company made an offer in writing to the Depot Quartermaster of the quantities of Army bacon, both serial 10¹ and serial 8², that it would be able to deliver during each of the months stated. (Finding XVI.)

In a letter dated November 26, 1918, the Depot Quartermaster requested the Food Administration, which participated in the working of the allotment plan of procurement, to allot to Swift & Company for delivery in the months of January, February and March, 1919, the quantities of serial 10 bacon stated in that company's offer of November 12, 1918, and urged that this be done "at the earliest practicable date" so that production would not be delayed. (Finding XVI.)

The allotment was made December 3, 1918,³ in writing, and Swift & Company accepted in writing. Finding XVI.)

The agreement thus concluded was ratified and confirmed by a letter from the Depot Quartermaster to Swift & Company dated December 10, 1918, ordering deliveries of serial 10 bacon in the months of January, February and March, 1919, in accordance with Swift & Company's beforementioned offer of November 12. (Finding XVI.)

¹ Serial 10 is canned bacon.

² Serial 8 is uncanned bacon.

³ At that time, while the Armistice had been signed, no peace had been declared or otherwise consummated. The Army was still in the field and had to be fed. Its food requirements were as great as ever. Nobody then knew that hostilities had ceased for good: nor, when peace was once established, how long it would take to bring home our Armies from across the sea; nor how large an army of occupation would be required. Not until October 22, 1919, did the Secretary of War declare the emergency at an end and rescind his order of April 12, 1917. (War Dept. General Orders No. 119.)

The January and February instalments were delivered and paid for.¹

On January 24, 1919, the Depot Quartermaster notified Swift & Company to put no more bacon in cure under this contract. Swift & Company at once complied. Since, however, it took about sixty days to prepare Army bacon, large quantities had already been put in cure to cover the March instalment, and the notice expressly stated that this would be accepted. (Finding XVIII.)

On March 5, 1919, the Depot Quartermaster notified Swift & Company to put no more of this bacon in smoke², but again assurances were given that what was already in process would be accepted and settlement made for any unfinished material. (Finding XIX.)

The preparation of the bacon already in process when

¹ The statement in the Government's motion that Army bacon purchased by the War Department for delivery in the months of January and February, 1919, was purchased after inviting competitive bids and under formal written contracts signed at the end by both of the contracting parties is directly contrary to what the record in the Court of Claims shows and to what that Court found. The January and February instalments were produced and delivered under the contract growing out of Swift & Co.'s written offer of November 12, 1918, and the Depot Quartermaster's written acceptance of December 10, 1918. (Finding XVI.) At that time, as we have seen, the competitive method of procurement had been suspended under the authority of Section 3709, Revised Statutes, and the Secretary of War's order of April 12, 1917, and orders were being placed by allocation or allotment. The so-called circular proposals sent out with respect to the January and February instalments were sent out, not for the purpose of obtaining bids as a basis for awarding orders, but merely as a step in determining what was a reasonable price under orders already placed and in course of fulfillment. (Findings X, XXII.) It is true that so-called formal contracts covering the January and February instalments were subsequently executed in March, 1919 (Finding XXII), but these were merely paper transactions, since at that time the bacon had not only been manufactured but delivered. What was said in *American Smelting & Refining Co. v. United States*, 259 U. S. 75, is applicable here: "We have said nothing about repeated requests that the claimant should sign a formal contract, its refusals, and its ultimate signing under protest, because these facts in no way modify the relation of the parties under the contract by letters already made." (P. 79.)

² Smoking, of course, is the next step in the process after curing.

these notices were received was completed under Army inspection, was passed by the inspectors as conforming with the required specifications, and was duly tendered. (Findings XXIII, XXIV, XXV.)

It was not accepted, however, the reason given being that the need for it no longer existed. A settlement was promised but never made. (Finding XXVI.)

The Court of Claims rested its decision on two grounds, *first*, that out of Swift & Company's offer in writing of November 12, 1918, signed at the end, and the Depot Quartermaster's order in writing of December 10, 1918, accepting the offer, also signed at the end (Finding XVI), a contract arose which meets the requirement of Section 3744, Revised Statutes, that contracts made by the War, Navy and Interior Departments shall "be reduced to writing and signed by the contracting parties with their names at the end thereof," especially when that section is read in connection with the later act of March 4, 1915, which relates specifically to contracts made by officers of the Quartermaster Corps, and provides that such contracts "shall be reduced to writing and signed by the contracting parties," but omits the words, "with their names at the end thereof" (citing *Harvey v. United States*, 105 U. S. 671, 688; *Brown v. District of Columbia*, 127 U. S. 579, 583; *American Smelting & Refining Co. v. United States*, 259 U. S. 75, 79); and, *second*, that in any event complete performance of the contract by Swift & Company takes the case out of the operation of these statutes (citing *United States v. R. P. Andrews Co.*, 207 U. S. 229, 243; *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159).¹

¹ On the authority of the cases cited the Attorney General, in an official opinion, has taken the same position on these two points of law. (32 Op. A. G. 114, 121-123.)

The Depot Quartermaster's order of December 10, 1918, is also valid and binding under Section 120 of the National Defense Act (39 Stat. 166, 213), which provides a short method of placing orders in time of war or when war is imminent, "in addition to the present authorized methods of purchase or procurement."

Still another ground on which the judgment of the Court of Claims can rest is the agreement or understanding reached by the parties early in 1918 for Swift & Company's continuous capacity production of Army bacon until further notice, which is enforceable against the United States under the Dent Act. (40 Stat. 1272.)¹

¹Although, as before stated, the Court of Claims found that such an agreement or understanding was entered into (Finding XII)—that, indeed, the evidence to that effect was undisputed (Op. p. 48)—it seemed to think that the subsequent contracts made from time to time by offer and acceptance for specific quantities showed that the parties were not acting under the agreement for continuous capacity production, and therefore it rejected the latter as a ground of judgment. (Op. p. 48.) That is a mistaken inference. After the agreement for continuous capacity production was made it was still necessary to have some procedure for determining the exact quantities to be delivered from time to time, and this was the function of the subsequent contracts. They were supplemental to the agreement for continuous capacity production. For a parallel case see *Claim of Carlisle Commission Co.*, Decs. War Dept. Cl. Bd., App. Sec., Vol. VIII, p. 1011.

The case would be within the Dent Act, indeed, even though there had been no express understanding such as was alleged and found, but only a definite request addressed to Swift & Company by an officer with proper authority to produce and deliver Army bacon to the extent of its capacity until further notice and compliance therewith by Swift & Company, both sides expecting compensation to be made. This Court so indicated in *Baltimore & Ohio R. R. Co. v. United States*, 261 U. S., 592, 599; and the Report of the House Committee on Military Affairs, in which the Dent Act originated, shows that it was intended to afford relief in just such a case. (Rep. No. 877, 65th Cong., 3rd Session.) That report divides into four classes the cases intended to be covered. The fourth class is described as follows: "In a considerable number of cases, while negotiations were still under way and before definite terms had been arrived at as to price or quantity, suppliers have been requested by the department to proceed to prepare for and to enter upon the execution of work for the department in advance of any final agreement upon the terms

The Requests for Further Findings.

REQUESTS I, II, III AND IV.

These requests inquire about certain War Department orders and instructions relating *generally* to the purchase of supplies. The sole object in making them is to try and find a footing for renewing in this Court the contention unsuccessfully made in the Court of Claims, that General A. D. Kniskern, Depot Quartermaster at Chicago, who entered into the present contract on behalf of the Government, and who during the time here in question made contracts for the purchase of hundreds of millions of pounds of meat supplies for the Army with the full knowledge and approval of the War Department at Washington, was acting beyond his authority.

That question has been conclusively determined, however, by the findings already made. These show that War Department orders and instructions relating to the purchase of supplies *in general*, while making "no specific exception as to meat supplies, * * *" were never treated as applicable thereto"—that "the necessities during the period of the war precluded such application" (Finding VII); that the purchase of meat supplies for the Army was treated as a *special* case and made the subject of *special* orders from time to time, one such being Office Order No. 491,

upon which they were to be remunerated, and so necessarily in advance of the reduction of the agreement to the form required by statute. Yielding to the exigencies of the war situation, *such contractors put the work of production ahead of the work of negotiation*, and have often put themselves in a position where their only reliance was the good faith and fairness of the Government in finally fixing the terms of the agreement." [Italics ours.]

issued July 3, 1918, by the Quartermaster General's Office, by which "there was established in Chicago a packing-house products branch of the Subsistence Division of the Quartermaster General's Office to be located in the General Supply Depot of the Quartermaster Corps at Chicago, to be under the immediate direction and control of the Depot Quartermaster, and to be responsible for all matters pertaining to the procurement, production and inspection of packing-house products, subject to the control of the Quartermaster General" (Finding V); and that the Acting Quartermaster General by whose direction this order was issued interpreted it as "delegat[ing] to General Kniskern [Depot Quartermaster at Chicago] the purchase of meat products and articles of that kind" (Finding V).

The Court of Claims further found:

"General Kniskern, as depot quartermaster at Chicago, was the authorized representative of the Acting Quartermaster General in the purchase of meat supplies and, while subject to any specific instructions which the Acting Quartermaster General might see fit to give him, his duty was to supply the needs, and specific authority as to each purchase was not required" (Finding VII).

The Depot Quartermaster at Chicago in making contracts for meat supplies for the Army was thus acting under specific orders from the Acting Quartermaster General whose office is particularly charged by law and custom with the duty and authority of providing supplies for the Army. No one higher in authority ever questioned the force or validity of these orders, much less revoked or disapproved

them. Unless and until so revoked they were valid and binding (*Parish v. United States*, 100 U. S. 500, 505).¹

The foregoing findings of the Court of Claims settle the question of the Depot Quartermaster's authority to make the contract, since under the circumstances of this case that is a question of ultimate fact.

The question of authority in connection with Government contracts has a double aspect, depending upon the circumstances of the particular case. Where the question is whether there is any provision of law authorizing anybody at all, even the head of a department or bureau, to make the particular contract, as in *Floyd's Acceptances*, 7 Wall. 666, or where the question turns upon the construction of a statute, there, of course, it is primarily a question of law. But where, as here, it is undisputed that the head of the department or bureau has authority to make the contract either directly or through a subordinate, and the only question is whether the particular subordinate assuming to act has been designated for that purpose, and if so whether he has performed his duty in accordance with the instructions of his superiors, the question is one of ultimate fact.²

¹In this case this Court, dealing with the case of an officer much lower in rank and authority than the Quartermaster General, said: "It is not intended to deny that he was subordinate to the chief of his Bureau; could be ordered to do or not to do particular things; and when an order made by him was disapproved, it might be revoked by that officer. *But until so revoked or disapproved it was valid and parties required to act under it had a right to rely on it.*" (P. 505.) [Italics ours.]

²It is the settled practice of the Court of Claims to make findings on questions of authority of the last-mentioned kind (see *Morgan Engineering Co. v. United States*, 58 Ct. Cl. 373, 374; *Atlantic City R. R. Co. v. United States*, 58 Ct. Cl. 215, 218; *George F. Horton v. United States*, 57 Ct. Cl. 395, 396; *Savage Arms Corp. v. United States*, 57 Ct. Cl. 71, 75; *Wilcox v. United States*, 56 Ct. Cl. 224, 227, 230; *Broadbent Laundry Corp. v. United States*, 56 Ct. Cl. 128, 129; *Wil-*

But even if it were a question of mixed fact and law, which is the most that can be claimed from the standpoint of the Government, the finding of the Court of Claims would still be conclusive. (*United States v. Omaha Tribe of Indians*, 253 U. S. 275, 281.)

It follows that the requests for additional findings on this point are not requests to have the Court of Claims directed to find any ultimate fact or facts, but are requests to have it directed to find facts which are merely *evidentiary* or *incidental*, and as such must be denied. (*McClure v. United States*, 116 U. S., 145, 151.)

It may be added that if this Court once began bringing up such evidentiary facts it could not stop with the four or five orders and notices selected by the Government, but might equally be called upon to bring up the whole maze of orders, notices, circulars and bulletins offered in evidence on this point. Nor could it stop even with that. If the

Liamis Eng. & Const. Co. v. United States, 55 Ct. Cl. 349, 351; *Yazoo & Miss. Valley R. R. Co. v. United States*, 54 Ct. Cl. 165, 168; *Martin v. United States*, 28 Ct. Cl. 137, 139; *Mott v. United States*, 9 Ct. Cl. 257, 259; *Allen v. United States*, 5 Ct. Cl. 339, 345); and this Court expects it to do so. For example, in the recent case of *Baltimore & Ohio R. R. Co. v. United States*, 261 U. S. 592, the opinion states:

"Here, however, there is no *finding* that Colonel Kimball had any authority to enter into the alleged agreement; and, on the contrary, such authority is negatived by the *finding* that none of the Government officials connected with work at Locust Point had any authority to order the construction of a temporary barracks." (P. 597.) [Italics ours.]

The Government itself on the trial treated the question of authority in this case as a question of ultimate fact and requested the Court of Claims to make a finding on it. (See Request No. VI, Government's Requests for Findings of Fact below, page 2590.) In connection with this request its brief stated: "There is no objection to a finding of *ultimate fact* based on the rules, regulations and the practice of the War Department, * * *." (P. 2612.) [Italics ours.] Disappointed that the Court did not find the ultimate fact to be as claimed by it the defendant now seeks in effect to have part of the evidence bearing on the point incorporated in the findings. This is exactly what was unsuccessfully attempted in *Mahan v. United States*, 14 Wall. 109, 112.

written orders and instructions were to be brought up, there would be even more reason for setting forth the oral testimony as to what the *practice* was in these matters, since departmental rules and instructions are frequently departed from in practice, especially during periods of emergency and stress. This testimony, given by witnesses for the claimant and the Government alike, would show, as the Court of Claims has found, that by the uniform practice of the War Department, throughout the entire period in question, the Depot Quartermaster at Chicago was recognized and treated as the officer authorized to make contracts for the purchase of meat supplies for the Army.

Besides this common ground for refusing Requests I, II, III and IV, there are separate reasons for refusing each.

The substance of Request I is that the Court of Claims be directed to find whether War Department General Orders No. 47 of May 11, 1918, and No. 55 of June 10, 1918, were in effect when the present contract was made. So far as General Orders No. 47 are concerned they simply reproduce Sections 3744-3747, Revised Statutes, and direct purchasing officers to comply therewith. What application those provisions of the statutes have to the case is, of course, a question of law.

General Orders No. 55 require in substance that contracting officers shall be "designated by the chief of the bureau to which the contracts pertain, such appointments to be effective only after the announcement of the names, rank and contracting authority of such officers by the chief of the bureau concerned." If the case were remanded with directions to find whether or not these orders were in effect when the present contract was made the Court of Claims

would have to reply that it has already done so—that the findings already made show that the purchase of meat supplies for the Army was treated by the War Department as a special case and made the subject of special orders, and that orders and instructions relating generally to the purchase of supplies for the Army, among which was General Orders No. 55, "were never treated as applicable thereto;" that "the necessities during the period of the War precluded such application." (Finding VII.)

But it would make no difference if General Orders No. 55 had been applicable to the purchase of meat supplies, since their requirements were met by the beforementioned order No. 491 issued July 3, 1918, by the Acting Quartermaster General. That order in establishing at Chicago, *under the immediate direction and control of the Depot Quartermaster at that point*, a packing-house products branch of the Subsistence Division, and making it responsible for all matters pertaining to the procurement, production and inspection of packing-house products, was itself a designation, "by the chief of the bureau concerned," of the Depot Quartermaster at Chicago as contracting officer for packing-house products.

Request II is that the Court of Claims be directed to find whether or not General Kniskern or any one of several other officers whose names are given had been designated by the Secretary of War or the Quartermaster General as contracting officer during the time here in question with respect to Army bacon, and if so to set out the order making such designation. This, also, has been done. As shown above, the findings already made state that General Kniskern possessed such authority and set forth the orders vesting it in him.

Request III is that the Court of Claims be directed to find whether any contract for Army bacon for delivery in March, 1919, was entered into in conformity with the provisions of Notice No. 189 of October 8, 1918, issued by the Acting Quartermaster General. A foot-note states that Notice No. 189 prescribed a form of contract and established a Board of Review the approval of which was necessary before any contract was deemed consummated. This is one of the large number of instructions issued by the War Department from time to time during the war in relation to the purchase of supplies generally, which the Court of Claims found were not treated as applicable to the purchase of meat supplies for the Army.

It is immaterial, however, whether Notice No. 189 was applicable to the purchase of meat supplies or not. That notice had nothing to do with determining who had authority to act as purchasing officers but on the contrary presupposed the possession of such authority by the officers to whom it was addressed and merely regulated the manner of its exercise.

There is, of course, a wide distinction between a lack of authority to contract (as, for example, in *Baltimore & Ohio R. R. Co. v. United States*, 261 U. S. 592), and mere failure on the part of an officer having such authority to observe the directions of his superiors as to the manner of exercising it. In the latter case, while the officer might be subject to discipline, the contract would not be invalidated.¹ This was decided in *Clark's Case*, 95 U. S. 538. There it will be recalled that the Court, while holding that the requirement

¹ During the War literally hundreds of instructions relating to purchases for the Army were sent from Washington to depot quartermasters and other purchasing officers throughout the country. Those introduced in evidence in this case constitute a large volume. At

of Section 3744 R. S. that contracts be reduced to writing and signed by the parties is mandatory, also held that the further requirements that the contracting officer shall make and affix to the contract an affidavit of disinterestedness and file the contract together with all bids, etc., in the proper office, are directory only, and, therefore, if the contracting officer fails to comply with them the contractor "is not responsible for this neglect." (95 U. S. 542.) Much less should the contractor suffer for failure of the officers of the Government to comply with such directions when they are not contained in any statute but only in administrative orders.

Moreover, as regards approval by the Board of Review, Notice No. 189 itself exempted from that requirement contracts made like the present one pursuant to allotment orders of the Food Administration. It provided that "purchase orders"—Q. M. C. Form 108B, as distinguished from formal contracts, Q. M. C. Form 108C—"shall be used to report calls under an allotment of the United States Food Administration or the United States Fuel Administration." While it also provided that such purchase orders should be forwarded "for study and consideration by the Board of Review," approval by the latter was not required, but on the contrary it was expressly stated that this provision "does

times they were conflicting. Hardly a day passed without a change in the instructions. The evidence showed that some were communicated to purchasing officers orally in conferences at Washington. To hold contractors chargeable with notice of these myriad instructions would create an impossible situation. Recognizing this, the War Department itself has held that while contractors are chargeable with knowledge of the statutes, they are not chargeable "with knowledge of the intricate administrative machinery resulting from war conditions, so far as relief under the Dent Act is concerned." (Case No. 421, Claim of William Carter Company, 7 Dees. War Dept. Cl. Bd. App. Sec., pp. 385, 386.)

not empower the Board of Review to change the terms of any executed purchase order."

Request IV is that the Court of Claims be directed to find whether or not any contract was entered into for Army bacon for delivery in March, 1919, which had been approved in writing by the Assistant to the Acting Quartermaster General in charge of finances, in conformity with Notice No. 45 of July 16, 1918, issued by the Acting Quartermaster General. This is another one of those general instructions which the Court of Claims found were not treated as applicable to the purchase of meat supplies for the Army. In any event, however, it could not possibly affect the present case. As appears from its text—set forth in a foot-note to the Government's motion, page 11—it does not require *contracts* to be approved by the Assistant to the Acting Quartermaster General in charge of finances, but only a change in the arrangements or methods of procurement—in other words a change of system. Moreover, as we have seen, the Depot Quartermaster at Chicago was proceeding under the authority of orders issued by the Acting Quartermaster General himself.

REQUESTS V, VI AND VII.

These all relate to the counterclaim, which was based on alleged overpayments by the Government, through mistake, for Army bacon delivered in the months of September, 1918—February, 1919, inclusive.¹ (See Government's Motion, pp. 7, 12.)

¹ The counterclaim was not filed until nearly six months after the last testimony had been taken and the claimant's brief had been filed, and two and one-half years after the petition was filed. Moreover, every fact and every figure on which the alleged counterclaim was based had been in the record over a year before it was filed.

The Court of Claims explicitly found that there was no mistake, as follows:

"It is not shown by the testimony of any witness having to do, for the Government, with the fixing or approving of prices for the six months in question, and four such witnesses have testified in the case, that they or any of them at any time regarded the prices fixed as in any wise unfair or that they were in any manner misled or deceived or deprived of access to desired information bearing thereon.

"It is not shown to the satisfaction of the court that improper or illegal charges were presented by the plaintiff to the defendant on account of Army bacon delivered from September, 1918, to February, 1919, both inclusive, as declared in the counterclaim, or that any such charges were by mistake paid by the defendant to the plaintiff.

"It is not shown that any deception, misrepresentation or concealment was practiced by the plaintiff to the detriment of the defendant in the matter of settlements made for bacon furnished during the months in question and it does not appear that justice requires the opening of the settlements made for those months." (Finding XXXIII.)

This is a finding of ultimate fact which this Court will not review. (*United States v. Adams; United States v. Johnson*, 6 Wall. 101.) In the case cited a motion was made, "to require the Court of Claims to make a more extended statement of the evidence on which they find 'that the allegation of fraud or mistake in the concoction of the written agreement is not sustained by the evidence in the case.' " (P. 112.) The motion was overruled, this Court saying:

"This is precisely the character of finding which the rule of this court was intended to produce. The existence of the fraud or mistake set up in the pleading is one of the ultimate facts to which the law of the case must be applied, in rendering a judgment, and this court does not purpose to go behind the finding of the court of claims on that subject. To do so would require an examination of evidence, and a comparison of the weight to be attached to each separate piece of testimony, and the drawing of inferences from the whole, which is the peculiar province of a jury and which, by our rule, we intended to exclude from the consideration of this court, by making such finding by the court of claims conclusive." (P. 112.)

Requests V, VI and VII must be rejected, therefore, as a plain attempt to get this Court to go behind the finding of the Court of Claims on a question of fact.

The fact is that for bacon delivered during the first four of the six months covered by the counterclaim the price was fixed by the Food Administration (Findings XXII, XXXIII), and for bacon delivered in January and February, 1919, the price remained practically the same. (Finding XXXIII.)

It would be impossible to conceive of a case where the Government was more completely protected against mistake, deception, or overreaching of any sort. The packers were under the most stringent war-time regulations. They could not do business without a license from the Food Administration and their profits were ascertained and limited by the Food Administration. The price of hogs—the chief element entering into the cost of Army bacon—was fixed by the Food Administration. They had to keep their books in

the manner required by the Food Administration and the Food Administration had unrestricted access thereto for the purpose of audit and control. It required regular reports and made periodical examinations and audits. (Finding XII.) Finally, if any packer had shown a disposition to exact more than a reasonable price for Army bacon, either the Food Administration or the War Department had the power to requisition the product summarily. Or, if need be, to take full possession of the company's plants.

The Request to have Incorporated in the Record the Government's Motion of May 13, 1924, for Amended and Additional Findings and for a New Trial, and Its Motion of October 13, 1924, Pursuant to Section 1088, Revised Statutes, for a New Trial on the Ground of Newly Discovered Evidence.

Should the Court be of opinion that these motions ought to be made a part of the record it would still be unnecessary to remand the case for that purpose. An order to send them up would be sufficient. If such an order shall be entered it should also include Swift & Company's replies. Since the Government has filed here copies of these motions and supporting briefs, copies of Swift & Company's replies are filed herewith, marked Exhibits A, B and C, respectively.

These motions, however, have no proper place in the record.

In *Young v. United States*, 95 U. S. 641, this Court held that the decision of the Court of Claims on a motion for a new trial under Section 1088, Revised Statutes, is conclusive, saying:

"We are all of the opinion that the decision of the Court of Claims, upon a motion by the United States, within the prescribed jurisdiction, [Section 1088, R. S.], is conclusive, and not subject to review." (P. 643.)

This disposes of the motion of October 13, 1924.

The original motion of May 13, 1924, for amended and additional findings and for a new trial, is equally barred.

Rule I of the Rules of this Court relating to appeals from the Court of Claims states with precision what proceedings shall be included in the record, and for emphasis adds, "and none other."

Motions for amended and additional findings and for a new trial are not mentioned and the uniform practice of the Court of Claims for a long time past has been to refuse to include them. (See *Gulf Refining Co. v. United States*, decided by the Court of Claims January 9, 1924.) The Government cites no case where such a motion has been included in the record and we know of none.

In *Gulf Refining Co. v. United States, supra*, the Court of Claims points out that between 1869 and 1879 there was a rule (Rule V) of this Court which did provide for including in the record prayers or requests for findings of fact which had been refused, but that in 1879 that provision was stricken from the rules. Upon the significance of this, it observes:

"The rules as thus changed have continued until the present time. It is manifest that much significance attaches to the change of original Rule V, because the substitute for it contemplates the omis-

sion from the record on appeal of matters specifically required by the original rule. Reasons for the change of the rule were stated by Chief Justice Richardson speaking for this court in the year 1885 in *Union Pacific Railway case*, 20 C. Cls. 508, 513, as follows:

'After several years' trial, experience proved that the practice under the old Rule V led to great difficulties and embarrassments, without contributing in any degree to the better presentation of the case. The requests for findings of fact filed by the parties were often so diffuse in language, and so interspersed with irrelevant matter, evidence, and propositions of law, either directly or inferentially, that a satisfactory finding or ruling upon each one separately could not well be made, and if made, its bearing upon the case, as presented by the findings of the court, drawn with reference to each other and all properly connected together, was difficult to ascertain.'

Besides, it would serve no purpose to include such motions in the record on appeal, since this Court's review of decisions of the Court of Claims is confined to questions of law arising out of the findings of fact as made by that Court. (*United States v. Omaha Tribe of Indians*, 253 U. S. 275, 283.) If either party considers the findings as made incomplete the remedy is by a motion to require the Court of Claims to make further findings. That remedy the Government has invoked in the first part of its present motion, heretofore considered.

Conclusion.

As no interest is recoverable from the Government up to the time of the rendition of judgment in the Court of Claims, any unnecessary postponement of the final judgment of that Court is a virtual denial of justice. The present case affords a striking example of this. It has been pending more than four years. Already the appellee has lost in interest approximately a quarter of a million dollars if the judgment of the Court of Claims is right. There is nothing in the showing made by the Government that would justify the further delay and consequent further loss to the appellee that remanding the case to the Court of Claims would entail.

Respectfully submitted,

G. CARROLL TODD,
Attorney for Appellee.

GREGORY & TODD,

Of Counsel.

March 9, 1925.

(5697)

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, APPELLANT
v.
SWIFT & COMPANY, APPELLEE } No. 920

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S MOTION TO REMAND TO THE COURT OF CLAIMS WITH DIRECTIONS TO MAKE FURTHER FINDINGS OF FACT, AND TO EMBRACE IN THE TRANSCRIPT OF THE RECORD CERTAIN MOTIONS WHICH WERE BEFORE THE COURT PRIOR TO THE ENTRY OF FINAL JUDGMENT

PRELIMINARY STATEMENT

Swift & Company, appellee, seeks to recover for producing 5,266,210 pounds of Army bacon for alleged delivery to the War Department in the month of March, 1919, 4,197,672 pounds of which was put up in cans of 12 pounds each. The balance, or 1,068,538 pounds, was only partially manufactured and was not canned.

The canned bacon, consisting of 4,197,672 pounds, was sold by the appellee upon its own car routes and through its branch houses at various times and

places in the United States, between September, 1919, and October, 1920, at prices ranging from 6 to about 39.5 cents per pound.

On account of the bacon which was canned, the appellee claims the right to recover the difference between the alleged cost of manufacture of between 48 and 49 cents per pound, plus a profit of $2\frac{1}{2}$ per cent, and the amount realized from the sales of the article, less interest, insurance, transportation, storage, and other expenses attaching to the disposition of the product. The appellee gave no notice to the Government that it proposed to so sell the commodity as an agent of or trustee for the United States.

Of the uncanned bacon, 1,003,313 pounds, was exported with other products by the appellee and sold in France, Germany, Belgium, and Norway in the summer of 1919, at net prices ranging from 12.30 to 35.94 cents per pound. After deducting the expenses attending these sales, the appellee sought to recover the difference between the alleged cost of production and the net amount realized from the sales thereof abroad. Recovery on this account was denied by the Court of Claims. Judgment, however, was rendered against the United States on the basis above stated (cost of production plus a profit of $2\frac{1}{2}$ per cent) for the 4,197,672 pounds of bacon which was sold by the appellee in the United States, and also for the cost of production incident to the partial manufacture of 65,225 pounds of uncanned bacon, less receipts from the sales thereof,

and for certain materials, less their salvage value. (Findings XXX and XXXIV.) A material portion of the product in controversy was manufactured in whole or in part by other companies than the appellee.

All Army bacon obtained by the War Department during the months of January and February, 1919, was purchased under certain formal contracts signed at the end thereof by both of the contracting parties, as required by Sec. 3744 of the Revised Statutes of the United States, and after the distribution of circular proposals inviting competitive bids for the quantity of the product specified, which bids were later considered and followed by an award of a contract to the successful bidder. The formal contracts for January and February, 1919, were based on these preliminary proceedings, which were referred to therein, and were not deemed consummated until approved by the Board of Contract Review in the office of the Quartermaster General, Washington, D. C., as provided by Notice No. 189 of October 8, 1918, issued by authority of the Quartermaster General. No bids were invited or submitted for the March, 1919, bacon in controversy. No award of a contract was made covering the month of March nor was any purchase order, even, issued to the appellee for any quantity of bacon whatever for that month.

The United States did not receive or obtain the benefit of any portion of the product in question. The appellant maintains:

1. That the War Department was never bound to take, accept, and pay for any March, 1919, delivery of bacon on the basis of the cost of production or on any other basis. No price was ever agreed upon between the duly appointed contracting officer of the War Department and the appellee for the commodity in controversy. Much less was any contract made and signed as required by Sec. 3744 of the Revised Statutes, which is mandatory in order to bind the United States and create a basis for damages. *United States Bedding Company v. United States* and *Erie Coal & Coke Corporation v. United States*, both decided January 5, 1925; *Clark v. United States*, 95 U. S. 539; *South Boston Iron Company v. United States*, 118 U. S. 37.

2. That no duly appointed and authorized contracting officer of the War Department made any informal agreement for the delivery of bacon to the Quartermaster Corps in the month of March, 1919. *Baltimore & Ohio R. R. v. United States*, 261 U. S. 592.

The appellee, however, asserts that a course of conduct pursued and certain letters written by the quartermaster or his subordinates at Chicago, in dealing with the appellee for a prospective purchase of bacon to be delivered in March, 1919, quoted in Finding XVI of the court, created a contract liability upon the United States for January, February, and March, 1919, which was breached by the latter, giving rise to an action for

damages on account of alleged losses sustained by appellee as the result of the Government's refusal to accept delivery of the March, 1919, bacon.

The appellant, however, maintains that the quartermaster at Chicago, who had charge of general administrative matters with respect to the procurement of packing house products for the Quartermaster Corps of the Army, was not named and appointed a contracting officer as provided by General Orders Nos. 47 and 55, issued by authority of the Secretary of War on May 10 and June 11, respectively, 1918, which nomination and appointment was essential in order to clothe that officer with authority to bind the United States in contract. The pertinent paragraphs contained in General Orders Nos. 47 and 55 applicable herein are printed in the appendix hereto, pages 19 to 23, inclusive. Other officers were appointed, in accordance with said Orders Nos. 47 and 55, as contracting officers to make and sign contracts for various packing house products, including Army bacon. The question of authority to bind the United States in contract, and the form and manner in which such authority was required to be evidenced, is a basic question in this case; and

3. That if an informal agreement was entered into between an officer not designated and appointed in accordance with orders issued by the Secretary of War, pursuant to Sections 219, 3744, and 3747 of the Revised Statutes, to bind the United States upon a contract, and the representatives of

the appellee (not shown to have contracting powers), the same was not sufficient as a basis for the recovery of damages in this case, because (a) the transactions were subsequent to November 11, 1918, and not within the Act of March 2, 1919 (40 Stat. 1272); (b) the Government did not derive any benefit therefrom; and (c) if it were liable, the measure of damages must be ascertained with reference to the market value of the commodity as of the month of March, 1919, and not on the basis of the cost of production plus a profit thereon.

The preceding proposition applies equally where there is a contract good in law—that is, such as is required by Section 3744 of the Revised Statutes and effected by an authorized contracting officer.

It is respectfully submitted that the facts applicable to the foregoing propositions have not been adequately stated in the findings of fact made by the court below; that if uncontradicted material facts, which were proven, had been found, such facts would have demonstrated that no judgment could have been properly rendered against the United States; that if the present findings could be considered adequate to the same end, their present emphasis is misplaced because of the failure to set out controlling and clarifying facts.

Hence, it is deemed desirable for the proper presentation of the issues to this court to move for a remand of the case to the Court of Claims, first, with directions to make further and additional findings of fact on questions of fact, for the purpose of

defining and clarifying the issue; and, second, to embody in the transcript of the record two certain motions, with accompanying papers in support thereof, which were filed and allowed on May 13 and October 13, 1924, respectively, prior to the entry of final judgment.

The motion which was filed on May 13, 1924, contains appellant's requests for amended findings of fact, with references to the Record in support of the same. The appellant submits that if the facts so requested had been found they would demonstrate that neither the quartermaster at Chicago nor his said subordinates who signed the letters set forth in Finding XVI of the court possessed authority to bind the United States in contract under the orders and regulations prescribed as aforesaid by the Secretary of War.

The appellant's motion of May 13, 1924, further requested the court to make findings of facts in respect of its counterclaim filed herein, in which it was alleged and strenuously contended that the appellee had been overpaid large sums of money on account of packing house products obtained from it prior to March 1, 1919, through mistake induced by the appellee. The precise issues relevant to the several matters in dispute were quite fully set forth in the appellant's said motion of May 13, 1924, which is filed herewith and marked "Exhibit "A."

In defendant's motion allowed to be filed on October 13, 1924, above mentioned, request was

made for leave to amend the motion of May 13, 1924, by adding thereto another ground for a new trial, based on newly discovered evidence, and because a wrong and injustice had been done the United States in the rendition of the judgment against it, within the meaning of Section 175 of the Judicial Code, Section 1088 of the Revised Statutes of the United States. The motion so made was supported by *prima facie* proof in the form of affidavits attached thereto, which were sufficient, as the appellant verily believes and contends, to require a new trial upon the proof so presented. It is respectfully submitted that error was committed by the overruling of said motion. The last mentioned motion is filed herewith and marked "Exhibit B."

It is further respectfully submitted that the position so taken is sound and tenable, and that these motions, which called attention to the omission of material facts in the findings of the court, and that a wrong and injustice had been done the United States, constitute matters which are necessary to be embraced in the record for a proper review of the case.

The prime object of this motion to remand is to obtain further information for this court in respect of matters that were before the Court of Claims prior to the entry of final judgment on October 28, 1924, and to the certification of the transcript therein. The purpose of the motion is therefore within the purview of the language employed by

this court in the case of *United States v. Young*, 94 U. S. 258, 260.

The appellant states for the information of this court that on January 30, 1925, it presented to the Court of Claims a motion "to amend, supplement, and embrace in the transcript of the record on appeal herein" the motions above mentioned. The transcript was certified under date of January 26, 1925. While the Clerk of the Court of Claims failed to embrace in the record the motions requested, that officer did after his attention was called thereto, amend the transcript by inserting therein the dates upon which said motions had been filed, namely, May 13, 1924, and October 13, 1924. Such insertion was made in the transcript without a recertification of the same, although additional matter was embodied therein on or about February 4, 1925, and the Clerk has declined to embrace said motions in the transcript as requested, although the appellant duly requested that the same should be contained therein, as more fully shown in the motion and by the resulting correspondence with the Clerk of said court all of which is printed in the appendix hereto. The appellant is, therefore, constrained to move this Court for an order directing the Court of Claims to transmit not only copies of said motions, but also supply additional information in respect of certain facts which are material for a review of the case, as hereinafter more particularly requested.

The United States, appellant, therefore, moves this Honorable Court to remand this case to the Court of Claims with directions to make and return herein further findings of fact on questions of fact as established by the evidence and to also embrace in the transcript of the Record two certain motions filed by the appellant, defendant below, which were before the court prior to the entry of final judgment on October 28, 1924.

And the appellant represents that the information so requested is material and necessary for a proper review of the case, and the same should be supplied in respect of the following particulars:

I

To find and state whether or not General Orders No. 47, dated May 11, 1918, and General Orders No. 55, dated June 10, 1918, issued by the Secretary of War, were in force and effect during the months of November and December, 1918, and January, February, and March, 1919, and if not in effect during any or all of said months, on what date and by whom the same were repealed or rescinded.

II

To find and state whether or not General A. D. Kniskern, and Major O. F. Skiles, and 2nd Lieut. O. W. Menge, and E. L. Roy, or any of them, had been designated and appointed by the Secretary of War or the Quartermaster General as contracting

officers of the United States for the purchase of Army bacon for the month of March, 1919. And if so designated and appointed, to set out the War Department order or orders making such designation and appointment.

III

To find and state whether or not any contract for the March, 1919, Army bacon in controversy was made between a contracting officer of the United States and the appellee, Swift & Company, in conformity with the provisions contained in Notice No. 189 of October 8, 1918, issued by the Acting Quartermaster General, and on the form prescribed by said notice or order. And if so made, whether or not the same was approved by the Board of Review, as in and by said Notice No. 189 provided.¹

IV

To find and state whether or not any purchase was made of Army bacon by the War Department to be delivered in March, 1919, which cast a financial liability upon the United States, and which had been approved in writing by the Assistant to the Acting Quartermaster General in charge of finances, or by some officer designated by him for the purpose, in conformity with Notice No. 45, promul-

¹ Notice No. 189 prescribed a form of contract and established a Board of Review in the Office of the Quartermaster General, whose duty it was to consider, review, and if deemed proper to approve all contracts for supplies purchased for the Quartermaster Corps, U. S. Army. No contract was deemed consummated without such approval.

gated by the Acting Quartermaster General on July 26, 1918.²

V

To find and state whether or not, between September 1, 1918, and March 1, 1919, the appellee sold and delivered to the War Department Army bacon at prices in excess of the actual cost of production plus 2½ per cent profit, as prescribed in the license granted to the appellee by the United States Food Administration, pursuant to the Act of August 10, 1917, 40 Stat. 276, 287, and if so, the amount of such excess.

VI

To find and state the aggregate of each item of the cost of production of the Army bacon delivered by the appellee to the War Department during and

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER GENERAL OF THE ARMY,
Washington, July 26, 1918.

Notice No. 45.

Subject: Changes in methods of procedure entailing financial liability.

1. Hereafter, any innovation in methods of procedure, in any division, or branch thereof, in the Quartermaster Corps, which casts a financial responsibility upon the United States Government, or which ultimately makes necessary the expenditure of Government funds therefor, shall be submitted for approval to the Assistant to the Quartermaster General in charge of finances, before any definite or final action is taken thereupon.

2. Any arrangements for purchases of supplies, which change the present methods of procurement of supplies and which cast a financial liability upon the United States Government, shall not be definitely closed or completed until the same shall have the approval, in writing, of the Assistant to the Acting Quartermaster General in charge of finances, or of some officer designated by him for the purpose of considering the aforementioned arrangement.

R. E. Wood,
Acting Quartermaster General.

for the months of September, 1918, to February, 1919, inclusive, and the price paid by the United States for the bacon so delivered.

VII

To find and state whether (and if so, when, by whom, and in what manner) the United States or any of its officers ascertained and determined the actual cost of production to Swift & Company, the appellee, of the bacon delivered to the War Department during and for the period from September 1, 1918, to February 28, 1919, inclusive; and whether or not (and if so, when, by whom, and in what manner) the United States fixed the selling price of said bacon.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

HERMAN J. GALLOWAY,
Special Assistant to the Attorney General.

MARCH, 1925.

APPENDIX

**In the Court of Claims of the United States. Swift
& Company, Plaintiff, v. The United States,
Defendant. No. 4-A.**

**DEFENDANT'S MOTION TO AMEND, SUPPLEMENT, AND
EMBRACE IN THE TRANSCRIPT OF THE RECORD ON AP-
PEAL HEREIN CERTAIN MOTIONS FILED IN THE COURT
OF CLAIMS WHICH WERE BEFORE THE COURT PRIOR TO
THE ENTRY OF FINAL JUDGMENT**

Comes now the defendant by its Attorney General, and moves the court to enter an order directing the Clerk of the Court of Claims to incorporate in the transcript of the record on appeal herein to the Supreme Court of the United States "Defendant's motion to amend the findings of fact filed herein by the court; to make additional findings of fact; to set aside the judgment for \$1,077,-386.30 rendered March 17, 1924; and to grant the defendant a new trial," filed May 13, 1924, and also "Defendant's motion for leave to amend its motion to amend the findings of fact filed herein, etc., and to grant the defendant a new trial," because of newly discovered evidence and because a wrong and injustice had been done the United States in the rendition of said judgment against it, within the meaning of Section 175 of the Judicial Code, Section 1088 of the Revised Statutes of the United States, 36 Stat. 1141, filed in open court October 6, 1924, which last-named motion

the court allowed to be filed on October 13, 1924. The defendant's said motion as amended was overruled by the court on October 28, 1924. Both motions were before the court prior to the entry of final judgment herein, and it is respectfully submitted that a transcript of said motions, together with the affidavits and documents attached to the motion allowed to be filed on October 13, 1924, and made a part thereof, with the rulings of the court thereon, should be embodied in the record herein on appeal, and are necessary to a proper review of the case by the Supreme Court.

(Signed) IBA K. WELLS,
Assistant Attorney General.

CHARLES F. JONES,

J. ROBERT ANDERSON,

Attorneys for the United States.

—
 JRA-JRW

C. F. J.; J. R. A.

No. 4-A

FEBRUARY 4, 1925.

Mr. J. BRADLEY TANNER,

Clerk of the Court of Claims,

Washington, D. C.

In re: *Swift & Company v. United States*, No. 4-A.

SIR: I am advised that on February 2, 1925, the Court endorsed on "Defendant's motion to amend, supplement, and embrace in the transcript of the record on appeal herein certain motions filed in the Court of Claims which were before the Court prior to the entry of final judgment," presented for filing on January 30, 1925, an entry or memorandum that "The Clerk will make up the record on appeal in this case in conformity with the Rules

of the Supreme Court, regulating appeals from this court."

The present transcript of the record in the above case was certified under date of January 26, 1925, and is returned herewith in order that the motions and accompanying papers above referred to may now, in accordance with the order of the Court, be added thereto.

The present transcript also appears to contain no reference to the action of the Court on defendant's motion "for leave to amend its motion to amend the findings of fact filed herein," which was filed on October 6, 1924, and allowed October 13, 1924. This should be added to the transcript also. (See Loveland's Forms of Federal Procedure, Vol. 2, Form No. 1785, page 2745.)

Respectfully,

(Signed) IRA K. WELLS,

Assistant Attorney General

(For the Attorney General).

(Inclosure 131609.)

COURT OF CLAIMS OF THE UNITED STATES,
Washington, D. C., February 5, 1924.

(Swift & Co., v. United States, No. A-4)

Hon. IRA K. WELLS,

Assistant Attorney General,

Washington, D. C.

SIR: Complying with your request of the 4th inst. (C. F. J., J. R. A.), I am forwarding herewith record on appeal in the above-entitled cause, which is prepared in conformity with the Rules of the Supreme Court regulating appeals from this Court.

The suggested change in the last paragraph of your letter has been complied with.

Respectfully,

(Signed)

F. C. KLEINSCHMIDT,
Assistant Clerk.

C. F. J.; J. R. A.
No. 4-A.

J. R. A; E. M. B.

FEBRUARY 9, 1925.

Mr. J. BRADLEY TANNER,
Clerk of the Court of Claims,
Washington, D. C.

In re: *Swift & Company v. The United States,*
No. 4-A, Court of Claims.

SIR: Your letter of February 5, 1925, in reply to mine of the 4th instant returning to you the transcript on appeal in the above entitled cause with a request that the same be amended by incorporating additional information therein, is received. You state that, "The suggested change in the last paragraph of your letter has been complied with," i. e., that certain additional information suggested in my letter of February 4, 1925, has been accordingly incorporated into the transcript.

I note, however, that you have omitted from the transcript of the record the suggested information referred to in the first paragraph of my letter of February 4, 1925, and more specifically mentioned in "Defendant's Motion to Amend, Supplement, and Embrace in the Transcript of the Record on Appeal herein Certain Motions filed in the Court of Claims which were before the Court prior to the Entry of Judgment." The motion to amend the record was presented for filing on January 30, 1925. The fact that the motions therein mentioned were filed and

allowed to be filed is stated in the third and fourth clauses of paragraph IX, page 102 of the present transcript and under the heading, "Proceedings after Entry and Judgment."

The two last-named motions so omitted from the record on appeal should, we submit, be incorporated therein as heretofore suggested. This is now all the more manifest because the data which was last added to the transcript is based upon the very definite information contained in defendant's motion of May 13, 1924, together with the amendment thereof, which was allowed to be filed on October 13, 1924. It would seem to be very clear that the motions and accompanying papers, which gave rise to the ruling of the court on October 28, 1924, are "necessary to a proper review of the case," because the same are within the Rule in such cases made and provided.

I am again returning the transcript that this may be done, unless you have been instructed by the Court, after my letter of February 4, 1925, to make up the transcript in its present form, or the Court, upon further consideration, shall instruct you to include the motions and accompanying papers suggested.

And should not the date of the certificate attached to the transcript be changed to conform to the date upon which any additional matter is added thereto? This applies to the present transcript as amended, as well as to any other or additional amendment.

Respectfully,

(Signed) IRA K. WELLS,

Assistant Attorney General

(For the Attorney General).

(Inclosure 27701.)

COURT OF CLAIMS OF THE UNITED STATES,
Washington, D. C., February 13, 1925.

(*Swift & Co. v. United States. No. A-4*)

Hon. IRA K. WELLS,
Assistant Attorney General
Washington, D. C.

SIR: Replying to your communication of the 9th inst. (C. F. J., J. R. A.) relative to the record on appeal in the above-entitled cause, will say that I am returning herewith the said record, and respectfully inform you that there is nothing I can add to that contained in my letter to you of the 5th inst. relating to the said appeal.

Respectfully,

(Sgd.) F. C. KLEINSCHMIDT,
Assistant Clerk.

[*Pertinent paragraphs of General Orders Nos. 47 and 55, dated May 11 and June 10, respectively, 1918]*

*	*	*	*	*
GENERAL ORDERS,		WAR DEPARTMENT,		
No. 47 }		Washington, May 11, 1918.		
*	*	*	*	*

V—1. Revised Statutes 3744 to 3747 provide as follows:

SEC. 3744. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to

writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return. (See Secs. 512-515.)

SEC. 3745. It shall be the further duty of the officer, before making his return, according to the preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths: "I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ____; that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ____, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided."

SEC. 2746. Every officer who makes any contract, and fails or neglects to make return of the same, according to the provisions of the two preceding sections, unless from unavoidable accident or causes not within his control, shall be deemed

guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than five hundred, and imprisoned not more than six months.

SEC. 3747. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to furnish every officer appointed by them with authority to make contracts on behalf of the Government with a printed letter of instructions, setting forth the duties of such officer, under the two preceding sections, and also to furnish therewith forms, printed in blank of contracts to be made, and the affidavit of returns required to be affixed thereto, so that all the instruments may be as nearly uniform as possible.

*Extract from Chapter 29, 1st Session, 1917.
June 15, 1917. (House Resolution 3971.) Statutes
1917, p. 198:*

SEC. 3744. Revised Statutes, is hereby amended by adding the following at the end of the last sentence:

"Provided, That the Secretary of War or Secretary of the Navy may extend the time for filing such contracts in the Returns Office of the Department of the Interior to 90 days whenever in their opinion it would be to the interest of the United States to follow such a course."

2. Numerous failures on the part of contracting officers of the War Department to comply with the provisions of these statutes have been brought to the attention of the department. The chiefs of the several supply bureaus will insure a precise and immediate compliance with these statutes. All contracting officers of the War Department will famil-

iarize themselves with these statutes and comply accurately with their provisions.

[160.14, A. G. O.]

By Order of the Secretary of War:

PEYTON C. MARCH,

Major General, Acting Chief of Staff.

Official:

H. P. McCAIN,

The Adjutant General.

GENERAL ORDERS,
No. 55

WAR DEPARTMENT,
Washington, June 10, 1918.

* * * * *

VII—Paragraph 2, section V, General Orders, No. 47, War Department, 1918, is amended to read as follows:

No contract will be signed by an officer whose name does not appear in the body of the contract as the contracting officer. Contracts will be made in the name of, and will be signed by, the officers designated by the chief of the bureaus to which the contracts pertain, such appointments to be effective only after announcement of the names, rank, and contracting authorities of such officers by the chief of the bureau concerned. Any officer so appointed shall be designated in the contract itself as the contracting officer and shall make and personally sign contracts in his own name. This shall be strictly complied with. Paragraph 563, Army Regulations, requires that the officer signing the contract shall be the person who makes the affidavit of disinter-

estedness, and this paragraph shall be strictly com-
plied with.

[062.1, A. G. O.]

* * * *

By Order of the Secretary of War:

PEYTON C. MARCH,

General, Chief of Staff.

Official:

H. P. McCAIN,

The Adjutant General.



INDEX

	Page
Previous opinions in the present case.....	1
Grounds of jurisdiction.....	1-3
Statement.....	3-19
Specification of errors to be urged.....	19-20

ARGUMENT

I. The court erred in holding that there was ever any valid binding contract on the part of the defendant to purchase Army bacon from the claimant for delivery in March, 1919.....	22-52
II. The court erred in holding that there had ever been either such complete or partial performance of a contract for the sale and delivery of Army bacon in March, 1919, as would render an informal and invalid contract an executed contract within the meaning of the law.....	52-59
III. The court erred in holding that there was an entire and single contract for the several amounts of Army bacon to be delivered in January, February, and March, 1919.....	60-61
IV. No agreement for March, 1919, deliveries of Army bacon was executed on behalf of the United States by any duly authorized contracting officer. The Court of Claims erred in holding the contrary.....	61-73
V. But if there was an entire agreement within the requirements of Rev. Stat. 3744 and executed on behalf of the United States by a duly authorized contracting officer for Army bacon deliveries for the months of January, February, and March, 1919, it was abrogated or rescinded by the mutual consent of the parties in issuing proposals for bids, submitting bids, and entering into contracts as required by law for the January and February deliveries of bacon.....	73-77
VI. The court erred in holding that the claimant used due diligence in disposing of Army bacon, Serial 10, in the United States, and in applying the wrong measure of damages to the facts disclosed.....	77-95
Conclusion	95-96

CASES CITED

<i>Ackerlind v. United States</i> , 240 U. S. 531, 534.....	51
<i>American Smelting Co. v. United States</i> , 259 U. S. 75.....	47, 48
<i>Baltimore & Ohio Railroad Co. v. United States</i> , 261 U. S. 592.....	61

	Page
<i>Braeley v. United States</i> , 96 U. S. 168	28
<i>Brown v. Dist. of Columbia</i> , 127 U. S. 579	29, 41, 75
<i>Caha v. United States</i> , 152 U. S. 211	18
<i>Carpenter v. First Nat'l Bank</i> , 119, Ill. 353	86
<i>Clark v. United States</i> , 95 U. S. 539, 541	38, 50, 51, 58, 63
<i>Cobb v. United States</i> , 18 Ct. Clms. 514	31
<i>Dollman v. Studebaker</i> , 52 Ind. 286	86
<i>Dusenberg Motors v. United States</i> , 260 U. S. 115	59
<i>Erie Coal & Coke Corp. v. United States</i> , 266 U. S. 518	50
<i>Ex parte Hitz</i> , 111 U. S. 766	18
<i>Ex parte Milligan</i> , 4 Wall. 2	63
<i>Export Oil Corp. v. United States</i> , 57 Ct. Cls. 519	56
<i>Fell v. Muller</i> , 78 Ind. 507	86
<i>Frederick v. American Sugar Refining Co.</i> , 281 Fed. 305	89, 91, 92
<i>Friedenstein v. United States</i> , 35 Ct. Cls. 1, 8	82, 86
<i>Gratiot v. U. S.</i> , 4 How. 80	18
<i>Guy v. United States</i> , 25 Ct. Cls. 61, 68	94
<i>Harkness v. Russell</i> , 118 U. S. 663, 667	86
<i>Hawkins v. United States</i> , 96 U. S. 691	70
<i>Henderson v. United States</i> , 4 Ct. Cls. 75	31
<i>Hinckley v. Pittsburgh Steel Co.</i> , 121 U. S. 264	88
<i>Hume v. United States</i> , 132 U. S. 406, 414	69, 70
<i>Jones v. United States</i> , 137 U. S. 214	18
<i>Malcomson v. Reeves Pulley Co.</i> , 167 Fed. 939; 93 C. C. A. 339	87, 92
<i>Monroe v. United States</i> , 184 U. S. 524, 527	28-51
<i>Peters v. Cooper</i> , 95 Mich. 191; 54 N. W. 694	87
<i>Seitz v. Brewers Refrigerating Co.</i> , 141 U. S. 510	37
<i>Shepard v. Hampton</i> , 3 Wheat. 200	81
<i>Simpson v. United States</i> , 172 U. S. 379	28
<i>Smith v. Pettee</i> , 7 Hun. (N. Y.) 334	82
<i>South Boston Iron Co. v. United States</i> , 118 U. S. 37	27, 40, 51
<i>Southern Cotton Oil Co. v. Heflin</i> , 99 Fed. 339; 39 C. C. A. 546	88
<i>St. Louis & Iron Mountain Ry. v. Taylor</i> , 210 U. S. 281, 295	32
<i>St. Louis Hay & Grain Co. v. United States</i> , 191 U. S. 159	43, 51, 70
<i>The Paquette Habana</i> , 175 U. S. 677	18
<i>The Pittsburgh, Cincinnati & St. Louis R. R. Co. v. Heck</i> , 50 Ind. 303	86
<i>United Press v. New York Press Co.</i> , 164 N. Y. 406	26
<i>United States v. Andrews & Co.</i> , 297 U. S. 229	44, 46
<i>United States v. Behan</i> , 110 U. S. 338	88
<i>United States v. Martin</i> , 26 Fed. Cas. No. 15, 732	70
<i>United States v. New York & Porto Rico Steamship Co.</i> , 239 U. S. 88	45, 47, 51
<i>Warren v. Stoddard</i> , 105 U. S. 224, 229	82
<i>Whiteside v. United States</i> , 93 U. S. 247	70
<i>Yellow Poplar Lumber Company v. Chapman</i> , 74 Fed. 444; 20 C. C. A. 503	87

III

STATUTES

	Page
Rev. Stats. 3700.....	4, 30
Rev. Stats. 3744.....	12, 27, 30, 45, 51, 64
Rev. Stats. 3747.....	62, 64
Judicial Code, sec. 145 (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1136).....	22, 84
Judicial Code, sec. 242 (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157).....	3
Act of June 2, 1862 (12 Stat. 411).....	27, 38, 45
Act of February 21, 1871, c. 62, sec. 37 (16 Stat. 427).....	42
Act of March 4, 1915, c. 143, sec. 1 (38 Stat. 1078).....	28
Act of March 2, 1919, c. 94 (Dent Act; 40 Stat. 1272).....	11, 14, 32, 33, 48, 56, 72
Food Control Act of August 10, 1917, c. 53 (40 Stat. 276).....	7
TEXTBOOKS	
2d Benjamin on Sales, 3d ed. 1075, secs. 1011, 1012.....	85

In the Supreme Court of the United States

OCTOBER TERM, 1925

Nos. 288 and 289

THE UNITED STATES, APPELLANT

v.

SWIFT AND COMPANY

SWIFT AND COMPANY, APPELLANT

v.

THE UNITED STATES

**ON APPEAL AND CROSS APPEAL FROM THE COURT OF
CLAIMS**

BRIEF ON BEHALF OF THE UNITED STATES

PREVIOUS OPINIONS IN THE PRESENT CASE

The opinion of the Court of Claims is reported in 59 Ct. Cls. 364, and appears also at R. 55-84.

GROUND OF JURISDICTION

The judgment to be reviewed, bearing date of March 17, 1924, appears at R. 84. By its terms the Court of Claims adjudged that Swift and

Company (hereafter called the claimant) should recover the sum of \$1,077,386.30 from the United States (hereafter called the defendant).

The claim was for an alleged breach of contract in refusing to accept a large amount of Army bacon manufactured by the claimant for delivery to the defendant during March, 1919. The defenses were interposed that no contract in fact existed; if there was a contract it was not reduced to writing as provided by Rev. Stats. 3744; that the alleged contract was not signed by a duly authorized contracting officer; that if there was a contract good in law for the January, February, and March, 1919, bacon, it was abrogated by the mutual consent of the parties; and that the claimant did not use due diligence in disposing of the bacon after receiving notice that the Government would not take it. A counterclaim also was filed alleging overpayments to the claimant for bacon delivered during preceding months.

From this judgment both parties have appealed; and their cross-appeals have been consolidated to form the present case. Swift & Company appeals on the ground that judgment should have been rendered for the full amount claimed in the petition, namely, \$1,459,885.09 (cf. R. 5, 8, 11, 14, 15). The United States appeals on the ground that no judgment should have been entered for the claimant.

In the court below the United States also put in the counterclaim for the sum of \$1,571,882.00

(R. 18-25). Judgment was given against the United States on this counterclaim. From the portion of the judgment dismissing the counter-claim the United States does not press its appeal.

The Court of Claims on March 17, 1924, handed down its findings of fact (R. 26-54), conclusions of law (R. 54-55), and opinion (R. 55-84). Judgment was entered as set forth above. The United States moved for an amendment of the findings of fact and for a new trial. The claimant also moved for a new trial. All these motions were overruled (R. 85), and both sides then appealed.

The appeals in this case were taken on January 26, 1925, under the authority of Section 242 of the Judicial Code as it existed prior to the recent amendments. (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157.)

STATEMENT OF CASE

This case involves the question whether the Secretary of War, in pursuance of Rev. Stats. 3744, caused contracts for the War Department to be reduced to writing and signed by the parties with their names at the end. Certain letters, quoted in findings of fact No. XVI of the court below (59 Ct. Cl. 378-382; R. 36-39), are the writings asserted by claimants to constitute a contract binding on the United States. A further question is whether partial performance was sufficient to take the matter out of the requirements of Section 3744 so as to make the United States liable in damages for a

breach of the alleged contract. The essential facts leading up to the controversy, as found by the court below, are as follows:

The Secretary of War by an order dated April 12, 1917, declared that an emergency existed within the meaning of Rev. Stats. 3709, and other statutes which except cases of emergency from the requirements that War Department contracts shall be made only after advertising. (R. 26-27.) That order directed that until further notice such contracts should be made without resort to advertising. In the early days of the emergency the usual advertising for bids and letting of contracts to the lowest bidders was adhered to, but later on, in 1917 and during 1918, such advertising became impracticable and was abandoned, resort being had to other methods of purchase. (R. 31.)

Colonel, later General, Albert D. Kniskern was directed by War Department order dated April 24, 1917, to "assume charge of the general depot of the Quartermaster Corps at Chicago, Ill." (R. 27.) By a similar order dated August 20, 1917, Captain Otto F. Skiles was directed to proceed to Chicago for duty as assistant to General Kniskern. (R. 27.) The latter was on duty in Chicago as Depot Quartermaster (R. 27) or Zone Supply Officer (R. 29) until September 1, 1919 (R. 27); that is, during the entire period in which this controversy arose.

Pursuant to order No. 491 dated July 3, 1918 (copy of which is printed in the Appendix hereto,

✓ page 100), from the office of the Quartermaster General of the Army, there was established a packing house products branch of the subsistence division—one of the five different divisions—of the Quartermaster General's office, this branch to be located in Chicago in the office of the Depot Quartermaster, and to be under his immediate direction and control, and responsible to him for all matters pertaining to the procurement, production, and inspection of packing-house products, subject to the control of the Quartermaster General. (R. 29.) At this time said "packing-house products branch of the Quartermaster General's office" had jurisdiction over the purchase of the bacon here in controversy, subject to the control of the Quartermaster General. This jurisdiction was continued after the transfer of the division on November 7, 1918, to the newly created office of the Director of Purchase and Storage (R. 28, 31), and the change in designation of the Depot Quartermaster—General Kniskern—to Zone Supply Officer. (R. 29.)

✓ On September 17, 1918, Captain Jay C. Shugert was designated by the Acting Quartermaster General as *purchasing and contracting officer for the packing-house products and produce division* of the office of the Depot Quartermaster of Chicago. (R. 31.) After a previous transfer order, by order of February 15, 1919, Captain Shugert was announced as officer in direct charge of the Chicago office packing house products branch, subsistence

division, of the office of Director of Purchase and Storage. (R. 31.) The control of the division had been transferred as hereinbefore stated on November 7, 1918, from the Quartermaster General to the Director of Purchase and Storage. Such transfer appears to have been only a paper transfer—a mere change in designation of officials. (R. 28, 31.) Of course, there were corresponding changes down the line from Kniskern as Depot Quartermaster to Zone Supply Officer (R. 29) to Captain Shugert from contracting officer in the office of the Quartermaster General to the office of Director of Purchase and Storage (R. 31).

The defendant may interpolate here to state that it believes these changes in office organizations to be relatively unimportant; for, after all, the offices, as such, had no power to contract on behalf of the United States, nor did they attempt to do so. The simple question remains, as set forth in the outset of this statement of the case, namely, whether the letters quoted at pages 36 and 39 of the record constitute a contract within the requirements of Rev. Stats. 3744, and if not, whether under the circumstances disclosed by the facts found below partial performance was sufficient to hold the United States liable in damages for its refusal to accept or pay for the March, 1919, bacon in controversy.

Army bacon requires not less than thirty days for curing and eight days for smoking. (R. 43, 46.)

After the suspension of advertising for bids for that product, the Depot Quartermaster, later Zone Supply Officer, at Chicago, General Kniskern, and his assistants, adopted the plan of calling in conference representatives of the packers, including Swift and Co., and advising them of the requirements of the Government for a stated period, usually three months. The packers thereupon furnished statements, in writing, as to the quantities they could furnish, and the Quartermaster General then made an allotment to each packer, and notified each as to the quantities it would be expected to furnish. (R. 32.) Subsequent to August 16, 1918, such allotments were made by the Chicago office of the Food Administration (R. 35), which was in charge of one Maj. E. L. Roy (R. 36), and which Administration had been established on August 10, 1917, by the President under the Food Control Act of August 10, 1917 (40 Stat. 276) (R. 33, 34.) Prices for the last four months of 1918 had been fixed by the Food Administration on the basis of cost of production, plus profit, within the limits fixed by the Food Administration license, at about the first of each month and on data furnished by the packers. (R. 43.)

It was after such a conference held on November 9, 1918 (R. 36), that the letter of November 12, 1918—one of the letters relied upon by Swift and Co. as constituting a contract in this case—was

written by Swift and Co. to the Depot Quartermaster as follows:

SWIFT & COMPANY,
UNION STOCK YARDS,
Chicago, November 12, 1918.

WAR DEPARTMENT,

*General Depot of the Quartermaster
Corps, 1819 West 39th Street, Chi-
cago, Illinois.*

Attention Maj. Skiles.

GENTLEMEN: Referring meeting in your office Saturday, November 9th, please be advised we offer for delivery during January, February, and March, 1919:

and	17,500,000 lbs. serial 10 bacon
	4,000,000 lbs. serial 8 bacon
21,500,000 lbs.	

We offer for delivery each month as shown under:

	Serial No. 10	Serial No. 8
January-----	6,000,000	1,400,000
February-----	5,500,000	1,200,000
March-----	6,000,000	1,400,000
Total-----	17,500,000	4,000,000

You will note we are offering a larger proportion of Serial No. 10 than of Serial No. 8 bacon. This because we have gone to great expense in equipping canning rooms at Chicago, Kansas City, and Boston on the understanding that you very much preferred Serial No. 10 bacon to Serial No. 8. The amount Serial 10 given above is the mini-

mum amount required to enable us to operate our canning rooms at fair capacity. If necessary, we are willing to have our offers Serial 8 bacon increased and Serial 10 decreased proportionately to the extent you find necessary, bearing in mind that we will appreciate as liberal a proportion of Serial No. 10 bacon as possible.

Will you kindly advise if we shall figure to put down above amounts for delivery as shown. After receipt of such advice we will furnish you with statement of amounts we will put in cure at each plant.

Yours respectfully,

SWIFT & COMPANY,

Per GFS, Jr.

Prov. Dept. JH-JL.

United States Food Administration, License No. G-09753.

On November 26, 1918, General Kniskern "by O. W. Menge, 2nd Lieut. Q. M. Corps," wrote a letter to the Chicago office of the Food Administration requesting it to make an allotment to Swift and Company for the months of January, February, and March, 1919, of the amounts of Serial #10 bacon set out in the aforesaid letter of November 12, 1918. (R. 37.) Why no action was taken as to the Serial #8 bacon offer in said letter of November 12 is not shown by the findings of the court below. The allotment was made as requested by letter of December 3, 1918, "the price to be determined later." (R. 38.) Swift & Company indicated its acceptance of this allotment by writing

below the stamped word "accepted" the following: Swift & Company, By G. F. S., Jr., 12/11/18," and returned it to the Food Administration. (R. 39.)

On December 10, 1918, the following letter was sent to Swift & Company:

(War Department, office of the Quartermaster General, Packing House Products Branch, Subsistence Division, 1819 West 39th Street, Chicago, Ill.)

DECEMBER 10, 1918.

Address reply to Depot Quartermaster, Marked for attention Div. 1-1-b, and refer to File No. 431.5 P&S-PC.

From: Officer in charge Packing House Products Br., Subsistence Div., office Director of Purchase and Storage.

To: Swift & Co., Union Stock Yards, Chicago, Ill.

Subject: Bacon Serial 10, January, February, and March.

1. In connection with the offers you made to this office on bacon, Serial 10, for delivery during the months of January, February, and March, you will please find indicated below the schedule of deliveries this office requests you to make.

January	6,000,000 lbs.
February	5,500,000 lbs.
March	6,000,000 lbs.

2. In order that proper arrangements can be made and all concerned informed accordingly, you are further requested to advise

this office by return mail where you contemplate putting up these allotments.

By authority of the Director Purchase and Storage.

A. D. KNISKERN,
Brigadier General, Q. M. Corps,
Officer in Charge.

By O. W. MENGE,
2nd Lieut., Q. M. Corps.

OWM: MJB

Special attention is invited to the fact that all of these letters were subsequent to November 11, 1918, the dead line fixed by the Dent Act of March 2, 1919 (40 Stat. 1272).

General Kniskern was instructed by telegram on December 16, 1918, from Washington, signed "Wood, Subsistence, Baker," under whose supervision and control he was (R. 30), that—

Effective with January requirements, the Army will purchase packing-house products independently of the Food Administration. This office is notifying Food Administration accordingly. You are authorized to proceed on this basis. (R. 44.)

On December 19, 1918, the Depot Quartermaster sent to Swift & Company a circular proposal requesting it to submit bids for January deliveries. A like proposal was sent on January 7, 1919, requesting bids for February deliveries, notifying Swift & Company in each instance to submit bids only on the "quantities previously awarded it for these months." (R. 44.)

Bids were submitted by Swift & Company and prices agreed upon for the January and February, 1919, deliveries of bacon, and said deliveries were completed on February 11 and March 3, respectively. Three formal contracts bearing date of February 10, 1919, were executed in accordance with Rev. Stats. 3744 by J. C. Shugert, Capt., Q. M. Corps, for the January deliveries, and one formal contract dated February 4, 1919, was similarly executed by the same officer on behalf of the Government for the February deliveries, and all four of the contracts were approved by the Board of Review (R. 44, 45), as provided for in regulations (R. 30).

No proposals for bids for delivery of March, 1919, Army bacon were sent to Swift & Company, no bids were received from said Company for such bacon, and no contracts were entered into therefor, as was done for the January and February, 1919, deliveries. (R. 45.) This Court will take judicial notice of the fact that the Armistice was signed on November 11, 1918, and that the emergency Army was thereafter rapidly demobilized. By letter dated January 24, 1919, General Kniskern, by O. F. Skiles, informed Swift & Company that, due to large quantities of bacon, etc., on hand, and in view of the fact that the Army was being rapidly demobilized, the Depot Quartermaster, whose designation had been theretofore changed to Zone Supply Officer, "will not be in the market"

for any of said products during the month of March. (R. 40.) The letter added:

2. Such quantity of bacon as is now in process of cure, over and above the quantity necessary to take care of February awards, and which has been passed by inspectors of this office, will be accepted.

3. This information is furnished you for the purpose of giving as much advance notice as possible of the intentions of this office, in order that you may take such steps as you may deem necessary toward the reconstruction of your commercial trade.

4. There is at present no likelihood of any further purchase of the products mentioned for several months.

This notice was received by the claimant on January 27th, the week end having intervened. It had begun on January 13, 1919, to put bacon in cure for March, 1919, delivery, but thereupon ceased to do so. However, it proceeded with the curing, smoking, and canning of that already in cure, notifying its subsidiaries to do the same. This notification was complied with. (R. 41.)

On March 5, 1919, but erroneously under date of February 5, 1919, General Kniskern, by Major Skiles, sent another letter to the claimant advising that an extension of time on deliveries of February bacon had been granted as requested to permit delivery up to March 31, 1919. (R. 41-42.)

He added that none of the commodities in question of the quantities noted beyond February con-

tracts would be required by his office, and that it would be necessary for the claimant to discontinue production immediately on commodities not intended for the February contract. He further advised that if claimant had any issue bacon *in smoke* in excess of the February amount, that would be accepted, but that under no conditions should any more bacon be placed in smoke for his office. (R. 42.)

He further advised that it was the intention of his office to enter into negotiations with the claimant, with a view to making settlement "for such material as you now actually have on hand *which can not be utilized* after completion of the February contract" (italics ours); that no further communication with his office was necessary; and that as soon as possible his office would call for certain information and the negotiations would begin. (R. 42.) He then added, "In the meantime you are *instructed to use every effort* to dispose of such material as you now have on hand, in order that adjustment may be quickly made" (italics ours). (R. 42.) It is to be noted that the Dent Act, 40 Stat. 1272, had become law on March 2, 1919, authorizing the Secretary of War to adjust informal contracts arising prior to November 11, 1918.

The claimant, upon receipt of this notice of March 5th, ceased putting bacon in smoke, but completed the smoking and canning of that already in smoke.

The Army bacon in cure by the claimant for March delivery, which remained unsmoked, was permitted to stay in cure from 78 to 86 days (R. 46), when more than 60 days was undesirable (R. 32, 46).

Swift & Company replied to this letter on March 7, 1919, stating: "*We offer for delivery during March*" certain quantities of bacon located at Chicago, Kansas City, and Boston aggregating 4,130,000 lbs. (R. 45-46), *and the present controversy arises because of the refusal of the United States to accept said offer.* Neither Kniskern, nor any of his assistants, appear to have replied to this letter, and on March 14, 1919, "*confirming conversation,*" Swift & Company, again wrote the Zone Supply Officer stating the same quantities and prices as in its letter of March 7th, and added that the bacon was blocking up its facilities. (R. 46.)

General Kniskern wrote in reply that it was impossible for his office to receive bacon for which purchase orders had not been prepared and that "*as soon as agreement is reached as to prices and purchase orders have been prepared, shipping instructions will be furnished.*" (R. 47.) That is, when the bacon had been actually purchased.

Again, on March 22nd, the claimant wrote to the General Supply Depot, reiterating its statement of March 7th as to quantity of Serial No. 10 bacon and proposed prices. On account of shortage of storage room, it requested purchase orders and

shipping instructions "in the very near future." (R. 47.)

On April 24, 1919, General Kniskern wrote to the claimant, stating that his office was taking steps for an adjustment of material on hand to be applied against March deliveries, "*which allotments were canceled.*" He requested that the claimant's representative be present at his office on April 29, 1919, "in order that you may be fully informed as to what methods shall be followed by your firm in submitting your claims." (R. 47.)

On April 29th, General Kniskern again wrote to the claimant, enclosing papers to be used in the preparation of a claim "for any amount you may consider due from the various packing-house commodities allotted you for delivery during March, 1919, and on which you will suffer a loss by reason of cancellation of those orders." (R. 48.)

On August 29, 1919, General Kniskern again wrote to the claimant (R. 48) with reference to its claim "for the value of bacon prepared by you under allotment given by this office on November 9, 1918," canceled and subsequently allotted by the Food Administration on December 3, 1918. He told the claimant that the Board of Contracts Adjustments in Washington had not taken action; that until the award on this claim has been assigned to his office it would be impossible to give definite instructions "as to the disposal of any of this product which may at this time be in your possession." Because of the perishable nature of the

product and its importance as food, he suggested that it should be disposed of "at the earliest possible moment." He further stated that it would not be possible for the Government to dispose of the bacon until the negotiations were completed and the actual ownership determined by the Government, "taking them at the agreed price or turning them over to you on a basis similar to the salvage basis of unfinished material."

General Kniskern added: "In the judgment of this office, if you are able to dispose of this product by a sale *within the limits of the United States* (italics ours), it would be a perfectly proper proceeding, bearing in mind, of course, that having made such sale it would be necessary for you, when the later negotiations are in progress, to be able to convince the negotiating officer that the price you may have received for such part of this product as has been sold was justified by the conditions." He told the claimant that the Government was then receiving about 34½¢. per pound for its own surplus bacon, adding that, in his judgment, sales by the claimant at that price would be in the interest of the Government. He suggested, however, that the claimant should endeavor to secure more definite information with reference to the sale from the Office of Director of Purchase and Storage (R. 48); that is, from his superior officer. (R. 30.)

The claimant began in September, 1919, after investigating foreign markets, to sell the bacon in question in the United States at wholesale through

its branch houses and its car-route selling department. At this time other packers were putting on the market bacon of the same character; and so was the Government. (R. 49.)

The claimant obtained one cent per pound less than the Government received for surplus bacon of the same character. The Government later reduced its price on Army bacon; and the claimant's sales followed the Government price, the lowest obtained being $22\frac{1}{2}\%$. per pound. The bulk of the sales of this character were completed in January, 1920, but some were made as late as October, 1920. (R. 49.)

The Court of Claims entered judgment in favor of claimant for \$1,077,386.30 (R. 48), made up of debits and credits in an explanatory statement (R. 55), and dismissing the Government's counter-claim.

The Department has concluded that under the rule adopted by this Court it will take judicial notice of orders and regulations issued pursuant to law by heads of Departments (*Caha v. U. S.*, 152 U. S. 211; *The Paquette Habana*, 175 U. S. 677; *Ex parte Hitz*, 111 U. S. 766; *Jones v. U. S.*, 137 U. S. 214; *Gratiot v. U. S.*, 4 How. 80), that it will not be necessary to have the case remanded for further findings of fact on the claim against the Government. It has also concluded to abandon the counterclaim against Swift & Company; that is, that the Government will not press the allowance of the

motion to remand filed in this Court on March 9, 1925, consideration of which was postponed until the hearing on the merits.

SPECIFICATION OF ERRORS TO BE URGED

The assignment of errors on which the Government relies may be stated under the following heads:

1. There was no valid contract within the requirements of Rev. Stats. 3744 binding the United States to accept and pay for March, 1919, deliveries of Army bacon, and making it liable in damages for refusal to do so. The Court of Claims erred in holding that such a contract existed.

2. The contract being invalid under statute, the United States was not liable in damages for failure to accept and pay for March, 1919, deliveries of bacon. The Court of Claims erred in holding that acceptance and payment for January and February, 1919, deliveries made the United States liable in damages for refusal to accept and pay for March, 1919, deliveries.

3. If the letters relied upon in finding XVI (R. 36, 39) give rise to any agreement whatever, they constitute three separate and distinct informal contracts for delivery of bacon during the three months of January, February, and March, 1919, and the performance of two of such contracts does not cure the invalidity of the third one. The Court of Claims erred in holding that they constituted a single agreement and that partial performance was

sufficient to charge the United States with damages for breach of the unperformed part.

4. No agreement for delivery of bacon in March, 1919, was executed on behalf of the United States by any duly authorized contracting officer. The Court of Claims erred in holding to the contrary.

5. But if there was an entire agreement within the requirements of Rev. Stat. 3744, executed on behalf of the United States by a duly authorized contracting officer for Army bacon for January, February, and March, 1919, it was abrogated or rescinded by the mutual consent of the parties in submitting proposals and bids and entering into formal contracts for January and February, 1919, deliveries.

6. Even conceding that it was an entire and valid contract, and that same has been breached by the Government, the claimant has failed to minimize its damages by not using due diligence in disposing of the rejected bacon. The Court of Claims applied the wrong measure of damages to the facts disclosed. Application of the correct measure of damages will preclude all recovery.

ARGUMENT

Summary

I

The court below erred in holding that there was ever any valid contract binding the defendant to purchase Army bacon from the claimant for delivery in March, 1919.

II

The court erred in holding that there had ever been either such complete or partial performance of a contract for the sale and delivery of Army bacon in March, 1919, as would render an informal and invalid contract an executed contract within the meaning of the law.

III

The court erred in holding that there was an entire and single contract for the several amounts of Army bacon to be delivered in January, February, and March, 1919.

IV

No agreement for March, 1919, deliveries of Army bacon was executed on behalf of the United States by any duly authorized contracting officer. The Court of Claims erred in holding the contrary.

V

But if there was an entire agreement within the requirements of Rev. Stat. 3744, and executed on behalf of the United States by a duly authorized contracting officer, for Army bacon deliveries for the months of January, February, and March, 1919, it was abrogated or rescinded by the mutual consent of the parties in issuing proposals for bids, submitting bids, and entering into contracts as required by law for the January and February deliveries of bacon.

VI

The court erred in holding that the claimant used due diligence in disposing of Army bacon Serial 10 in the United States and in applying the wrong measure of damages to the facts disclosed.

I

The court below erred in holding that there was ever any valid contract binding the defendant to purchase Army bacon from the claimant for delivery in March, 1919

This cause of action is based upon an alleged express contract for the purchase of Army bacon from the claimant for delivery in March, 1919. The jurisdiction of the Court of Claims was invoked under Section 145 of the Judicial Code. (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1136.)

In substance, the decision of the court below, expressed with some doubt (R. 64, 72), was that a valid and binding contract between the Government and the claimant was created by the letter of November 12, 1918 (R. 36), from the claimant to the General Depot of the Quartermaster Corps at Chicago, and the letter of December 10, 1918 (R. 39), from Brigadier General Kniskern, "by O. W. Menge, 2nd Lieut.," to the claimant. To relieve its doubts, the court further found (R. 73) that under the facts of this case the claimant was entitled to the benefits of full performance, which took the case outside the scope of Rev. Stats. 3744.

The letter of November 12, 1918, was a letter from the claimant to the War Department, General Depot of the Quartermaster Corps, Chicago, Illinois, offering certain deliveries of Army bacon, both Serial 10 and Serial 8, in specific quantities for each of the months of January, February,

and March, 1919. Elastic conditions were attached as to the variation in amount of each kind of bacon which it was willing to deliver at a separate price for each of the named months. The price remained undetermined and was to be fixed later by negotiation. (R. 37, *supra*, p. 8.)

The letter of *December 10, 1918*, was addressed to the claimant and signed by "A. D. Kniskern, Brigadier General, Q. M. Corps, officer in charge, by O. W. Menge, 2nd Lieut. Q. M. Corps." It stated (R. 39) :

In connection with the *offers* you made to this office on bacon, Serial 10, for delivery during the months of January, February, and March you will please find indicated below the schedule of deliveries this office requests you to make. [Italics ours.]

This expression is followed only by the amounts of *Serial 10* Army bacon which had been offered by the claimant in its letter of November 12th. Its offer of *Serial 8* is not mentioned. The letter requests information as to where the claimant contemplates putting up the allotments. (R. 39, *supra*, p. 10.)

We assume for the purpose of this argument, but do not concede, that the Government agents who signed the letter of December 10th had proper authority. The question must now be considered whether the two letters constitute a contract binding upon the United States. The offer of the claimant will be first examined.

It will first be noticed that the terms of the offer contained in the letter of November 10, 1918, negative any conclusion that a prior binding contract existed. It is an offer intended for acceptance, and does not indicate any prior acceptance. This fact is shown by its uncertainty as to the quantities of Serial 10 and Serial 8 bacon offered and by its uncertainty as to the proportionate amount of each kind which the Government might accept. It will further be noted that the offer of Serial 8 and Serial 10 bacon is *not* a separate offer of each kind, but is an offer couched in language which shows a *joint* tender of *both* kinds of bacon. The conditions expressed therein, with reference to the varying amounts of Serial 10 and Serial 8 bacon, leave no room for doubt on this point. The letter, it is true, expresses a willingness that the respective quantities of bacon therein tendered may be varied if necessary. But there is no language to show that the claimant was willing to permit the entire extinction of the *offers* as to either one of the two types of bacon. Nor was there expressed any place of delivery or price for the bacon.

The letter of December 10th, which is supposed (by inference only) to constitute an acceptance of these offers, refers only to Serial 10 bacon, and requests information as to the place at which the claimant contemplates putting up such bacon. In this particular, the record is silent as to any response from the claimant.

Under these circumstances, the question necessarily arises whether the letter of December 10th was an acceptance, sufficient on its face and by its terms, to bind the claimant, if the *Government* had undertaken to enforce the contract. In other words, was the acceptance responsive to the offer? It may be argued that the claimant did in fact deliver the quantities mentioned for January and February, 1919, and that it thereby ratified the contract. But this subsequent ratification in no way satisfied the statutory provisions which require, at the very least, that Government contracts shall be reduced to writing and signed by the parties to be charged. A written acceptance by the claimant of the terms contained in General Kniskern's letter of December 10, 1918, would have been necessary, at the very least, to have constituted a "reduction to writing." There can be no doubt that, upon the receipt of General Kniskern's letter of December 10th, the claimant would have had the right to reject his acceptance, on the ground that it was not responsive to the claimant's offer. The claimant had offered certain amounts of both Serial 10 and Serial 8 bacon, subject to variation of quantities. It did not offer either type alone. But General Kniskern undertook to accept only Serial 10, saying nothing of Serial 8, nor anything as to the price but *inquiring* as to the place of delivery.

To sustain the claimant's case, we must accept the absurd conclusion that these two letters form

a contract binding upon the Government, although there is no price mentioned, no place of performance indicated, and no legal liability on the part of the claimant to perform the contract. The United States urges that these letters do not constitute an agreement of any kind.

In *United Press v. New York Press Company*, 164 N. Y. 406, Judge Gray said:

It (the contract) lacked support in one of its essential elements, in the absence of a statement of the price to be paid. That was a defect, which was radical in its nature and which was beyond the reach of oral evidence to supply; for, if the intention of the parties, in so essential a particular, can not be ascertained from the instrument, neither the court, nor the jury, will be allowed to make an engagement for them upon the subject.

Correspondence of this vague character and indefinite effect can not by any construction of law be held sufficient to satisfy the mandatory requirements of the statutes governing the execution of Government contracts.

Where it is contended that a contract is embodied in letters passing between parties, there must be no substantial element of doubt as to what the contract is and whether the parties are bound thereby. Such doubt prevents a contract from arising, even between individuals. To hold that such correspondence binds the Government, in the face of the statutes already quoted, would be to nullify the efforts of Congress in the exercise of what was

deemed a wise public policy to safeguard the public interests. Congress clearly intended to make it absolutely necessary that Government contracts should be executed in a manner whereby certainty of terms and fixed responsibility should be beyond question.

The United States further urges that in any event the letters of November 12 and December 10, 1918, do not constitute a valid contract. Certain acts of Congress prescribe the methods by which the Government may be bound under contracts made by its agents. The first of these is Rev. Stats. 3744, which provides:

It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their names at the end thereof. * * *

This section originated in the Act of June 2, 1862, c. 93 (12 Stat. 411). By the decision of this Court in *South Boston Iron Company v. United States*, 118 U. S. 37, the provisions of the earlier Act were held to be mandatory and inescapable.

"It is the final written instrument that the statute contemplates shall be executed and signed by the parties and which shall contain and be the proof of their obligations and rights." *Monroe*

v. *United States*, 184 U. S. 524; *Simpson v. United States*, 172 U. S. 379. Mr. Justice White restated in the latter case the rule laid down in *Brawley v. United States*, 96 U. S. 168, and said:

The written contract merged all previous negotiations, and is presumed in law to express the final understanding of the parties. (Italics ours.)

The letters of November 12 and December 10, 1918, were merely preliminary negotiations and they were never merged into a written contract and signed by the parties in accordance with Section 3744 of the Revised Statutes, so far as the March bacon was concerned. As stated, such contracts were executed as to the January and February bacon.

The opinion of the Court of Claims also refers to the Act of March 4, 1915, c. 143 (38 Stat. 1078).¹ The regulations made pursuant thereto by the War Department, as contained in Paragraph 724, Manual for The Quartermaster's Corps, are attached to this brief as an appendix (*infra*, p. 102).

Examination of this Act of 1915 and of the regulations pursuant thereto discloses, first, that the War Department, in promulgating its regula-

¹This act provided that thereafter:

* * * Whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Quartermaster Corps authorized to make them, and are in excess of \$500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Quartermaster General. This statute has been construed in *Export Oil Corp. v. United States*, 57 Ct. Clms. 519.

tions, regarded the provision of the Act of 1915 to the effect that "such contracts shall be reduced to writing and signed by the contracting parties," as merely a reenactment of the procedure required by Rev. Stats. 3744. The court below regarded the Act of 1915 as of doubtful application to the facts here involved, saying:

If it affects this case, it is only because it lends countenance to a conclusion that Section 3744 may be complied with without the appending of the signatures of both parties on the same paper at the end thereof. (R. 66.)

It is evident that the Act of 1915 could be of interest here only if it were held that a series of informal letters constituted compliance with its provisions. It is respectfully submitted that the expression "reduced to writing and signed by the parties" connotes more than individual letters. It contemplates the reduction of the contract itself to a formal writing. The point may be illustrated by comparison with the language of the statute under consideration in *Brown v. District of Columbia*, 127 U. S. 583. There the statute ran: "all contracts * * * shall be in writing and shall be signed by the parties making the same." Such language as this authorizes the acceptance of *any* written contract as used in the ordinary terms of the law. But the language of the Act of 1915, when taken in connection with the established pub-

lic policy expressed in Rev. Stats. 3744, leaves no room for such latitude of construction.

Reference has been made to Rev. Stats. 3709.² Consideration of this section shows that its purpose is to obviate the necessity of public advertising in cases "when immediate delivery or performance is required by the public exigencies." There is nothing in the subsequent part of this statute, where it says "the articles or service required may be procured by open purchase or contract at the place and in the manner in which such articles are usually bought and sold or such services engaged between individuals," which would relieve the purchasing officer from the duty of taking a written contract, pursuant to Rev. Stats. 3744. The purpose of Rev. Stats. 3744 is to provide certainty and responsibility with reference to *all* contracts entered into on behalf of the Government. Its application is not confined alone to contracts which are preceded by advertisement and bidding. Moreover, Rev. Stats. 3709 requires, in the first place, *immediate delivery* of the purchased article required by the public exigency.

² All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

It can not be said that a sale of bacon initiated in November, 1918, to be delivered in March, 1919, is a contract for "*immediate delivery*," even considering the time required for its preparation (not more than sixty days at the most; cf. R. 46). The War Department order of April 12th, 1917, shows that the exigency there declared was to affect *advertising* of contracts only. It was not to affect the form of their execution. (R. 27.) Under no construction placed upon Rev. Stats. 3709, can justification be found for waiver in this case of the provisions of Rev. Stats. 3744. The court below has so held in *Henderson v. United States*, 4 Ct. Clms. 75; *Cobb v. United States*, 18 Ct. Clms. 514. See also the rulings in 20 Opp. A. G. 496 and 26 Comp. Dec. 592.

The court below held that the Food Administration had "no authority to contract nor can we find any evidence in the record, in connection with its allotment of bacon, of any intention or attempt to contract." (R. 63.) It therefore follows that the acceptance indorsed on the allotment by the claimant (R. 38-39) could not have constituted a written contract of even the most informal character, binding upon the United States.

The fact that statutory provisions as to Government contracts may sometimes operate to bring about apparent hardships, affords no ground for judicial legislation. As this Court has said:

This argument [based upon hardship] is a dangerous one, and never should be heeded

where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than to break down the rules of law. [*St. Louis and Iron Mountain Rly. v. Taylor*, 210 U. S. 281, 295.]

Acts of Congress of the type now under consideration stand on the same ground of public policy as the Statute of Limitations. The wisdom of the policy which dictates their enactment is not open for examination or construction. Nor can the statutes be evaded by elastic application.

If these two letters, under the conditions shown by this record, are held to constitute a binding contract between the Government and the claimant, a rule of law will be established which is very far beyond the limits of any previous decision, either in this Court or in the Court of Claims. Such a rule would to a very large extent nullify the statutes enacted to prevent just such uncertainty as exists in this case with respect both to the liability of the contractor and to the terms of the contract.

In this case, no applicable statute can be found which dispenses with the requirements of Rev. Stats. 3744. Some effort has, however, been made to create an atmosphere of emergency, which, in some undefined fashion, is argued to be authority for a loose construction of the law.

The claimant has also sought to avail itself of the provisions of the Act of March 2, 1919, c. 94 (40 Stat. 1272), known as the Dent Act.³

The letter of November 12, 1918, containing the claimant's offer, was written while the bells of Armistice Day were still echoing as a notice to all that the really great emergency, which had confronted our Government during the War, was substantially lessened, and in the near future would probably disappear. The Dent Act fixed a public policy with reference to contracts made under stress of emergency justifying the removal of the mandatory provisions of the law usually applicable to Government contracts. That Act drew a line at midnight, November 11, 1918, and in effect declared that thereafter no such emergency existed. Conditions were declared to be such that those who dealt with the Government must of necessity be on their guard both as to the statutory form of the contract and as to the authority of those with whom they dealt. No further exemption was allowed from the requirements of Rev. Stat. 3744.

*That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis, that has been entered into, in good faith during the present emergency *and prior to November twelfth, nineteen hundred and eighteen*, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition, or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law. * * *

It is possible, of course, for individuals to establish a "course of business" in the light of which their contracts and their attempts to contract may be construed. But it is respectfully submitted that, in the presence of the mandatory provisions of a statute dealing with Government contracts, it is not within the power of any Government agency, no matter of what importance or high standing, and no matter what its motives, to nullify the exact provisions of the law. The nonobservance of the law renders Government contracts unenforceable.

It is further submitted that no subsequent conduct (short of acceptance of full performance) on the part of a Government agent can change that agent's correspondence into a binding contract. If, at the time of its execution, that correspondence was uncertain in its terms and failed to observe the statutory form, it can not afterwards give rise to a binding obligation.

There is, it is true, further correspondence in the record between the claimant and General Kniskern or Major Skiles, such as the letter of January 24, 1919 (R. 40), the letter of March 5, 1919 (dated in error February 5) (R. 41, *supra*, p. 13), and the letter of August 29, 1919 (R. 48, *supra*, p. 16), which tends to show that these officers regarded the Government as possibly responsible to some extent for damages growing out of its refusal to receive bacon for delivery in March, 1919. However, a careful examination of this correspondence will disclose that in the letter of January

24, 1919, General Kniskern declared that his office *would not be in the market for delivery during March*, except as to the bacon then "in process of cure, over and above the quantity necessary to take care of February awards and which had been passed by inspectors of this office." The record shows no acceptance of this proposal; and no claim is made by the claimant that either this letter or the one of March 5th constituted any part of the contract.

Again on March 5, 1919, under erroneous date of February 5, General Kniskern informed the claimant that none of the bacon beyond that required for the February contracts would be needed. He further declared that it was the intention of his office to enter into negotiations with the claimant "with a view of making settlement for such material as you now actually have on hand *which can not be utilized after completion of the February contract*" (Italics ours). The letter of August 29, 1919, from General Kniskern to the claimant, discusses the claim for the value of bacon prepared, and states that, until the claim should be assigned to his office "for the purpose of conducting negotiations with you as to the manner in which the *informal contracts* shall be adjusted," it would be impossible for him to give any definite instructions as to disposal of the product. The letter then goes on to suggest, as a matter of opinion, what the writer thought might be a proper manner of

disposition, but gives a warning that the disposition must be made in such a fashion as to convince a negotiating officer that any price received was justified by conditions.

It will be noted that it required the passage of the Dent Act to validate such adjustments of irregular contracts even when made during the period of emergency prior to November 12, 1918.

In the letter of August 29, 1918, General Kniskern states, in substance, that until the rights of the respective parties have been determined, the Government can take no steps toward disposing of the bacon. It is respectfully submitted that the subsequent declarations of General Kniskern can not change into a binding contract the letter of November 12, 1918, and the letter of December 10, 1918. It appears, moreover, that even General Kniskern entertained the view that the Government was bound, not by reason of any valid contract in December, but rather by reason of informal invalid contracts. This is shown by the language used in his letter of August 29, 1919, describing the arrangements between the claimant and the United States as "*informal contracts.*" (R. 48.)

We must also consider certain acts of the claimant and of Government officials, taking place subsequent to the two letters claimed to have constituted a valid contract. The record shows that the amounts of Army bacon which were to have been delivered during *January and February, 1919*, were covered by contracts executed pursuant to statute,

namely, by written contracts signed at the end by the parties to be charged, together with the ordinary purchase orders and payment pursuant thereto. (R. 45, *supra*, p. 12.) It is difficult to construe this fact otherwise than as proof that both the Government officials and the claimant recognized that there had previously been no existing valid contracts with reference to the supply of bacon for *January, February, and March*. The execution of contracts in the statutory form was a further recognition of the fact that the statutory requirements had until then been disregarded. At the very least, it must be conceded that both parties realized the substantial doubt as to the existence of any valid contract.

The court below (R. 74) mentions *Seitz v. Brewers Refrigerating Company*, 141 U. S. 510, as authority for the doctrine that where written contracts are silent, oral evidence may be introduced to establish certain contractual relations, if it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole transaction between them.

It is submitted that this doctrine has no application to Government contracts, which are required to be reduced to writing and signed by the proper parties at the end thereof. Even if a series of letters be taken to satisfy the statutes, reduction to writing of *all the* essential terms of the contract remains necessary.

Again, the court below (R. 74) cites Williston on Contracts (§§ 652, 660) to the effect that custom and usage are admissible to construe written contracts in matters with respect to which they are silent. It is further stated that "a habit of business confined to the two parties to the contract may by implication be adopted as an express part of it." This doctrine is applied with reference to the lack of a fixed price in the agreements now under consideration. (R. 74.)

Again it is submitted that no custom of business adopted between a contracting Government official and a vendor can be made use of to supply any of the *essential parts* of an alleged contract, which the statute requires to be reduced to writing and signed by the parties.

Examination of this Court's decisions discloses none which tend in the least to destroy or limit the protection which was intended to be afforded the Government in the making of purchase contracts.

In the early case of *Clark v. United States*, 95 U. S. 539, 541, this Court held that the provisions of the Act of June 2, 1862, c. 93 (12 Stat. 411) (now incorporated in Rev. Stats. 3744), were mandatory. The Court there said (at p. 541):

* * * The facility with which the government may be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be produced to

any required extent, renders it highly desirable that all contracts which are made the basis of demands against the government should be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves, and prevent them from making reckless engagements for the government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with any officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect.

It is true that this language refers to the reduction of the oral contract to writing. It is silent as

to the further requirement that the written contract must be "signed at the end thereof." But it is evident that where no written contract of any kind existed, it was unnecessary for this Court to discuss the question of signatures. However, the Court did say:

We are of the opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until *it passes from the observation and control of the party who enters into it.* [Italics ours.]

This fixes a limitation as to what parts of the statute are mandatory, namely, those parts which operate up to and including actual execution and delivery of the contract.

In *South Boston Iron Company v. United States*, 118 U. S. 37, 42, this Court, reaffirming the doctrine of the *Clark case*, held that, to bind the United States, contracts by the Navy Department must be in writing and signed by the contracting parties, as required by Rev. Stat. 3744-3747. It is true that the Court did not expressly hold that the contract must be an entire one and signed at the end by the parties. But here again such a decision was not necessary under the facts of the case.

Those facts were that the President of the Iron Company wrote to the Navy Department, offering to build certain boilers for the Navy from drawings and specifications to be furnished by the Navy Department, at a stipulated price per pound. A

memorandum endorsed on the offer shows that it was accepted by verbal direction of the Secretary of the Navy, and that subsequently the Chief of the Bureau involved wrote to the President of the Iron Company stating that, by direction of the Secretary of the Navy, his prior offer was accepted, "upon the terms and conditions named in said letter." Similar correspondence took place between the Iron Company and the Navy Department relative to further boilers required. This last correspondence was dated about March 10th. No specifications or plans were submitted by the Department; and on March 16th the Department advised the Iron Company to discontinue all work previously contracted for, until further directed by the Secretary of the Navy. The Court of Claims held that Rev. Stats. 3744 required all contracts "to be reduced to writing and signed by the contracting parties with their names at the end thereof," that this provision was mandatory, and that contracts which did not comply with it were void. The Supreme Court held that the letters constituted only preliminary negotiations and not an enforceable contract within the meaning of the law. It is apparent that the silence of this Court on the question of signatures at the end of the contract was not the result of a deliberate decision to that effect. In the view taken of the case, no decision on this point was necessary.

Brown v. District of Columbia, 127 U. S. 579, involved an alleged paving contract with the District

of Columbia. Section 37 of the Act of February 21, 1871, c. 62 (16 Stat. 427), provided that "All contracts made by said Board of Public Works *shall be in writing* and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the Secretary of the District." The claim was made that a formal proposal in writing accepted by the duly authorized Secretary of the Board, whose signature was not denied, was a valid contract binding upon both parties. This Court referred to numerous authorities to show that "a written acceptance by one party of a written proposal made to him by another party created a contract of the same force and effect as if the formal articles of agreement had been written out and signed by said parties," and then stated that the legal principle asserted was sound. However, the real finding of the Court was, in the end, that the Board had never authorized the transaction and that the contract was for this reason invalid.

The language used in Rev. Stats. 3744 (and the construction placed upon that language by this Court), can be clearly distinguished from the language used in Section 37 of the Act of February 21, 1871. Rev. Stats 3744 clearly requires the execution of a formal contract, *signed at the end by the parties*. The Act of 1871 requires only that the contract shall be *in writing*. Its broad language is evidently intended to require only written evidence of the contract.

In *St. Louis Hay & Grain Company v. United States*, 191 U. S. 159, it was held that when a void but not illegal contract of sale has been performed on both sides, the vendor can not recover on a *quantum valebat*, less the amount already paid.

The facts were that the contract for the sale and delivery of certain hay to the United States was not in writing; and that the oral contract, according to the construction placed upon it by the claimant, required the Government to take the hay in certain daily amounts. It was contended that this provision was violated by the Government. It was also contended that the Government had failed to take a certain part of the total amount of nine million pounds for which it had contracted.

The Court of Claims held that the contract, not having been "reduced to writing, and signed by the contracting parties with their names at the end thereof," could not have been sued upon if it had not been performed, citing the *Clark case* and the *South Boston Iron Company case, supra*.

This Court held that the contract as such was invalid and void; but that the invalidity of the contract was immaterial if it had been performed. The Court added:

* * * But there was nothing which the law could recognize as duress, and the suggestion that it was peculiarly the duty of the officers of the Government to see that the contract was put in binding form, is very far from making out an analogy to

fraud. The claimant was bound to know the law at its peril. The agent of the United States made no representation, and the claimant in no way purported to submit its judgment to him, *if that would have bettered its case.* [Italics ours.]

In *United States v. Andrews & Company*, 207 U. S. 229, the "contract" consisted of a circular letter from the War Department to the claimant requesting that it furnish certain printed supplies, to which the claimant by letter responded that it would furnish those supplies at the prices asked by the Government Printing Office, plus freight to Manila, where the supplies were to be used. The War Department later wrote to the vendor to deliver the supplies to certain steamship agents at the Pennsylvania Docks in Jersey City. This delivery was made by the vendor. The goods were injured in transit; and upon their arrival in Manila, the Government refused to accept them.

It was urged by the Government that the contract, consisting of the letters just mentioned, did not comply with the requirements of Rev. Stats. 3744, since it was not "reduced to writing and signed by the contracting parties with their names at the end thereof." This Court held, not that the correspondence constituted a compliance with the provisions of Rev. Stats. 3744, but that the contract had become executed when the vendor delivered the goods to the carrier designated by the Government. In other words, complete execution

of the void contract took it beyond the provisions of Rev. Stats. 3744.

In *United States v. New York and Porto Rico Steamship Company*, 239 U. S. 88, the contract consisted of a written request by the Government that the Steamship Company make a tender for the transportation of coal, and a written offer of the Steamship Company so to do. This offer was accepted by telegraph on the same day. The Steamship Company afterwards wrote to acknowledge the telegram, and advised that it would in due course indicate what steamers it would tender. There was further correspondence on the basis of a mutual contract. When the Steamship Company failed to furnish the agreed transportation, the Government sued for breach of the contract. The defendant set up that the contract did not comply with the provisions of Rev. Stats. 3744.

The decision of this Court discusses the origin of Rev. Stats. 3744, derived from the Act of June 2, 1862, c. 93 (12 Stat 411), and refers to the *Clark case*. The Court then says:

* * * and while it is established that a contract not complying with the statute can not be enforced against the government, it never has been decided that such a contract can not be enforced against the other party. The prevailing opinion can not be taken to signify that the informal contract is illegal, since it went on to permit a recovery upon a *quantum valebat*

when the undertaking had been performed by a claimant against the United States. *United States v. Andrews*, 207 U. S. 229, 243, 52 L. ed. 185, 191, 28 Sup. Ct. Rep. 100. Of course the statute does not mean that its maker, the government, one of the ostensible parties, is guilty of unlawful conduct, or that the other party is committing a wrong in making preliminary arrangements, if later the Secretary of the Navy does not do what the act makes it his duty to do.

There is no principle of mutuality applicable to a case like this, any more than there necessarily is in a statute requiring a writing signed by the party sought to be charged. The United States needs the protection of publicity, form, regularity of returns and affidavit (Rev. Stat., sections 3709, 3718-3724, 3745-3747; Comp. Stat. 1913, sections 6832, 6862, 6863, 6865, 6869, 6872-6874, 6897-6899) in order to prevent possible frauds upon it by officers. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the government, not upon him. We see no reason for extending the implication of the act beyond the evil that it seeks to prevent. Even when a statute in so many words declares a transaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, "void" being held to mean only voidable at the party's choice. [Italics ours.]

American Smelting Company v. United States, 259 U. S. 75, involved these facts. A smelting company had agreed, by a series of letters with the Government, to deliver a large quantity of copper at a stated price, with the view of executing a formal contract. This formal contract was later executed, although under protest by the smelting company. There was some delay on the part of the Government in issuing shipping orders for a part of the copper, but all was finally delivered. Between the date of the contract and the final delivery the price, fixed under Government control, had advanced from 23½¢ per pound to 26¢. The Smelting Company claimed the right to receive the later price, first, on the ground that it had acted under compulsion of law in entering into the contract. This Court held there was no such compulsion. Secondly, the Smelting Company contended that there had been no advertisement of the bids, as provided by Rev. Stats. 3709. This Court said that the emergencies of war then existing justified the omission of publication of bids, and, furthermore, that Rev. Stats. 3709 was solely for the protection of the Government. Its provisions were not available to the plaintiff. On this point the Court cited *United States v. New York & Porto Rico Steamship Company*, *supra*. It will be recalled that the *New York & Porto Rico S. S. Co.* case involved the application of Rev. Stats. 3744. The Court further held that the plaintiff must stand upon the letters in question as to the terms of its contract.

It is apparent that the judgment of this Court was as follows: Under the circumstances of the case there was no compulsory seizure. The deliveries were in pursuance of a contract which, although voidable at the option of the Government, was binding upon the plaintiff. This contract had been executed as to all of its terms, except possibly as to some delay in receipt on the part of the Government. The matter of the delay sounded in damages for breach of contract, if any claim could be made; but such a claim was not before the Court at that time. The Court further found that the provisions of the Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272) did not apply to the case. Where an agreement, entered into by letters, has been later embodied in a formal contract, although under protest, and delivery and acceptance have been fully performed, there is no ground for the application of the Dent Act so as to increase the purchase price fixed by the letters which indicated the agreement of the parties.

It is further apparent that the provision of the Dent Act as to settlement of irregular contracts "upon a fair and equitable basis" was not designed to increase the contract price in performed contracts, but was designed to protect the Government in such settlements.

In the case at bar, the Court of Claims apparently was of the opinion (R. 66) that *American Smelting Co. v. United States* was authority for the proposition that a contract between the Govern-

ment and a vendor, consisting of a series of letters, satisfied the provisions of Rev. Stats. 3744. This opinion of the Court of Claims was based upon the final paragraph in the opinion of this Court in the *Smelting Company* case. That paragraph in substance stated that this Court had not deemed it necessary to deal with evidence showing repeated requests that the "claimant should sign a formal contract, its refusal, and its ultimate signing, under protest, because these facts in no way modified the relation of the parties under the contract by letters already made." (259 U. S. 75, 79.)

Consideration of the whole opinion in relation to this last paragraph shows that no such conclusion as to the satisfaction of Rev. Stats. 3744 is justified. In the last paragraph, this Court said only that the letters constituted the agreement of the parties, as subsequently embodied in a formal contract; that the contract had been executed; that the Government sought no avoidance of the contract, under Rev. Stats. 3744; and that therefore the application of Rev. Stats. 3744 need not be considered. There was certainly no finding that in an unperformed contract, or in one only partially performed, the Government could not avoid the contract if it were not executed in the manner prescribed by law. The Court had already decided that Rev. Stats. 3709, as to advertising of bids, was solely for the protection of the Government, and was not available to the plaintiff. For this, the Court cited the *New York & Porto Rico Steamship Co. case* in which it

had held that *Rev. Stats. 3744 was likewise solely for the protection of the Government.*

It can not therefore be argued that the *Smelting Company* case is authority for the proposition that the Government must necessarily be bound by a contract not complying with law as to form and execution, or as to so much of that contract as remains unperformed, by reason of nonacceptance of delivery. *Clark v. United States*, 95 U. S. 539, 542.

Erie Coal & Coke Corporation v. United States, 266 U. S. 518, 521, is a very recent expression of this Court giving effect to Rev. Stats. 3744. In that case, the Secretary of War, acting under permissive legislation, advertised approximately 40,000 tons of nitrate of sodium for sale at public auction in Washington. The advertisement stated (1) that bidders would be required to make deposit of 10% of the purchase price; (2) that acceptance of any bid would not be final until the execution of a contract and a bond, which should provide that (3) the Government "at its election may rescind said sale any time before August 1, 1922 * * *."

The claimant was the highest bidder. The nitrates were knocked down to it by the auctioneer, and it deposited more than 10% of the price. The claimant then demanded that the Secretary of War execute a contract of sale. This the Secretary refused to do, on the ground that the price offered was inadequate. Suit was then brought for the excess of the market price over the total of the claimant's bid.

This Court held that there could be no recovery under the terms of sale. Had the contemplated contract been issued, the situation would not have been altered, since under it the United States would have had the right to rescind.

Concluding, Mr. Justice Butler said:

Moreover, section 3744, Revised Statutes, required the Secretary of War to cause every contract made by him, or by officers under him appointed to make contracts, "to be reduced to writing and signed by the contracting parties with their names at the end thereof." The Act of July 11, 1919, authorizing the Secretary to sell surplus war supplies, is not inconsistent with that section and does not repeal or modify it. There is no reason why it should not apply to contracts made in pursuance of the later act. It must be held that, because of the failure to make and sign a written contract as required by section 3744, the United States was not bound. *Clark v. United States*, 95 U. S. 539, 541; *South Boston Iron Co. v. United States*, 118 U. S. 37, 42; *St. Louis Hay & Grain Co. v. United States*, 191 U. S. 159, 163. And see *Monroe v. United States*, 184 U. S. 524, 527; *United States v. New York & Porto Rico Steamship Co.*, 239 U. S. 88, 92; *Ackerlind v. United States*, 240 U. S. 531, 534.

Examination of all the above cases, decided by this Court, must lead to the conclusion that the provisions of Rev. Stats. 3744 are mandatory; that only fully executed contracts escape the applica-

tion of its requirements; and that informal letters are held to constitute a contract voidable at the option of the Government.

Accordingly it is submitted, on the authority of Rev. Stats. 3744, as construed by this Court, that the court below erred in holding that the agreement for the delivery of Army bacon in March, 1919, was in any way binding upon the United States.

II

The court erred in holding that there had ever been either such complete or partial performance of a contract for the sale and delivery of Army bacon in March, 1919, as would render an informal and invalid contract an executed contract within the meaning of the law

The court below considered that any doubt as to the existence of a valid contract in this case was cured by performance. It held that the claimant had done such acts as entitled it to a finding of full performance in relation to an alleged *entire* contract for the sale of Army bacon for delivery in *January, February, and March, 1919* (R. 70).

This conclusion of law is largely based, first, upon a further conclusion of law that there was an *entire* contract for the sale of bacon to the Government for delivery in *January, February, and March*, and second, upon findings of fact to the following effect:

(a) The claimant had made deliveries for the months of *January and February, 1919*;

(b) The claimant had purchased on the market hogs suitable to manufacture the bacon in question, had butchered large quantities of them, and had devoted that part suitable for the purpose to the manufacture of Army bacon, along with its commercial business of like character. It had received notice that the Government would not be in the market or require bacon in excess of the amount necessary for the *February* delivery. This notice was contained in the letter of January 24, 1919 (R. 40-41), and in the letter of March 5, 1919 (R. 41), if, indeed, it was not implied by the proposals in December and early January for bids for January and February deliveries of bacon (R. 44). At R. 45 appear the specific amounts claimed to have been cured and smoked, or to have been put in cure before notice was received. These facts indicate that on March 5, 1919, the claimant had manufactured, smoked, and canned Army bacon to the amount of over 4,000,000 pounds and had in cure bellies for Army bacon to the amount of more than 1,000,000 pounds;

(c) The complete manufacture and preparation of the 6,000,000 pounds of bacon for the *March* delivery was prevented by receipt of the notices of January 24th and March 5, 1919.

Before reaching a conclusion on the facts stated, it will be well to note that in the alleged acceptance by General Kniskern on December 10, 1918 (R. 39), this phrase appears, "In connection with the *offers*

on bacon, serial 10, for delivery during the months of January, February, and March." There follows *a segregation of bacon into specific monthly deliveries.* There is no purchase of a *gross amount divided into equal monthly deliveries.* The price was left unascertained and was subsequently fixed upon each month's delivery as a matter of separate negotiation for each month. Separate proposals, bids and formal purchase contracts and purchase orders were issued for the January and February deliveries and separate payment made therefor. Only on January 13, 1919 (R. 40), were the first bellies put in cure for the March delivery after the proposals and bids for the January and February deliveries. A formal purchase order was issued to the claimant for the January deliveries on January 4th (although subsequently canceled, and another issued under date of February 10, 1919). The whole procedure (R. 44) was sufficient to put the claimant on notice as early as December 19, 1918, of a change in the methods of purchase authorized and used by the Quartermaster's Department. (R. 44.) Yet the claimant, with this knowledge in its possession, *on January 13th* began to prepare for a delivery of bacon in March for which no proposals had been issued or bids submitted.

The agreement, being a contract of purchase and sale, can not be said to have been fully performed, where the March delivery was never made, although this delivery was in all probability prevented by

notice that the Government was not in the market. Such preparation as had been made by the claimant to execute the March delivery was neither performance nor part performance of a purchase and sale contract.

The only part performance which may by possibility be considered, is the performance of the deliveries for *January and February*. This, the claimant argues, was sufficient to take the agreement for *March* delivery outside the requirements of Rev. Stats. 3744.

The court below held that under all the circumstances the claimant was entitled to the benefits of full performance. (R. 73.) At the same point in its opinion the court concluded that the same result might be reached by another line of reasoning, as follows. When on January 24, 1919, the claimant was notified that the Government would not be in the market for March bacon, it was further notified that the Government would accept such bacon as was already in cure, above what was necessary to complete February deliveries, and had been inspected. This was evidently not a performance of a binding contract, but was merely a concession to peculiar conditions. The court further calls attention to the notice of March 5th, erroneously dated February 5, 1919, where the Government further stated that it would accept certain quantities of smoked bacon; and the court finds that the claimant, according to those instructions, ceased

to produce. Neither of these two notices can be held a sufficient compliance with Rev. Stats. 3744. At the most, these notices can only be used by the claimant as a reason for nonperformance of a contract which, if invalid, was voidable at the option of the Government, and if valid, must find validity in the letters of November 12, 1918, and December 10, 1918.

Action by a Government official, which brings about *cessation* of the preparatory measures necessary to produce goods alleged to have been sold to the Government can not validate the contract of sale if it does not comply with Rev. Stats. 3744. The subsequent interference of the agent creates no cause of action against the Government. *Export Oil Corporation v. United States*, 57 Ct. Claims 519. And it was for this very reason that the Dent Act of March 2, 1919, 40 Stat. 1272, was enacted to settle informal contracts entered into prior to November 12, 1918. See H. R. Rep. No. 877, 65th Cong., 3d sess.

With reference to the performance of the agreement for March delivery, the court below took the view that the agreement was an *entire* contract as to deliveries for January, February, and March. The facts disclosed by the record are that from the very first the parties contemplated *separate deliveries for the several months in varying quantities, at prices for each month's delivery to be settled later by separate negotiations*. The price and place of performance for each month was a matter of

subsequent negotiation. In the end, separate proposals, separate acceptances, separate formal contracts, and separate payments, were made in connection with the January and February deliveries.

In face of all these facts, it is difficult to see how these distinct agreements can be called an *entire* contract. The three chief factors in a sales contract are the amount of goods sold, the place of performance, and the price. In the case at bar, the last two factors were left undetermined for separate settlement as to each month's delivery. The letters relied upon to show the first factor do not agree with reference thereto. The record is very clear that the parties, in the actual performance of the contracts, so far as delivery was concerned, treated them as separate contracts. The original proposal by the claimant in the letter of November 12, 1918, made an offer of total quantities of Serial 10 and of Serial 8 bacon, providing for delivery of each in varying amounts throughout the three months in question. The letter from the Quartermaster Depot in Chicago, indicating the amounts of Serial 10 to be delivered, segregated the order into *three different amounts to be delivered in each of the months involved*.

Full performance as well as formal execution of the contracts for January and February, under the cases cited in Point I, placed those transactions beyond the scope of Rev. Stats. 3744. But it can not be said there had been any performance by delivery of the March contract sufficient to exclude

that agreement from the application of Rev. Stats. 3744.

Clark v. United States, supra (at page 542), shows that Rev. Stats. 3744 is not rendered inapplicable, in the consideration of an invalid contract, merely because a part of the contract has been performed, or because the claimant can recover, as to that part, on a *quantum meruit*. In the *Clark case*, a vessel leased under an invalid contract was under Government control and in Government service for eight days, and then was lost by misadventure. The oral contract provided that in the event of such loss the Government should pay for the vessel. The Court held that the contract was invalid, and that the Government had possession of the vessel under an implied contract which created only a simple bailment for hire, and that as to the remaining provisions of the void oral contract the Government was not liable. In other words, recovery was allowed on a *quantum meruit* for the actual benefits conferred on the United States.

Applying this principle to the case at bar, it is evident that even if the agreement here involved is held to be an *entire* contract, still the deliveries for *January* and *February* did not validate that part of the invalid contract which remained unperformed—the part, namely, which provided for *March* deliveries. As to those parts of the invalid contract which were performed and as to which the Government has received benefit, namely, the Janu-

ary and February deliveries, the claimant has been compensated in full.

There is no doctrine of law which holds that under the provisions of a void contract of sale to the Government, a vendor is entitled to claim full performance by reason of making preparations to purchase or produce the articles to be delivered to the Government, when the contract, before full performance, is rejected by the Government.

This Court held in *Dusenberg Motors Corp. v. United States*, 260 U. S. 115, that even where a contract had been entered into in accordance with Section 3744, Revised Statutes, and had been later canceled, the contractor can not recover such preliminary outlays. It was there said:

But it (the contractor) took that chance and has not now a legal claim against the Government for reimbursement of its outlays. We need not distinguish between the outlays nor dwell upon them. They were outlays of the speculation, and subject to sacrifice and loss with its disappointment (p. 124).

A fortiori such outlays in whatever form can not be recovered where, as here, there was no formal contract executed in accordance with the imperative provisions of Rev. Stats. 3744.

Accordingly, it is respectfully submitted that the Court of Claims erred in holding that the contracts here in issue were rendered valid and binding by "full performance" as to the bacon which was not delivered on the March allotment.

III

The court Erred in Holding That There Was an Entire and Single Contract for the Several Amounts of Army Bacon to Be Delivered in January, February, and March, 1919

This assignment of error, as a matter of necessity, has been partly considered above, under Point II. It is only desired to add a reference to the opinion of the court below, at R. 72:

Any separation of the month of March and its treatment as a matter of independent negotiation is, therefore, unauthorized.

This statement, we submit, is not justified by record, especially since two necessary elements of the contract, namely, the place of performance and the price to be agreed upon, were the subject of separate negotiations and separate settlement in each month's contract. The only element that can be held certain under the terms of the alleged offer and acceptance was that a definite amount of bacon of a specified kind would be delivered in each month.

Before preparations were begun for the production of March bacon, the claimant was given notice that separate proposals, separate orders of purchase, and separate formal contracts were to be used for the several monthly deliveries. (R. 44.) This procedure was followed in the January and February deliveries. If those separate formal contracts are to be given any effect whatsoever it fol-

lows that the proposed delivery in March would have been in turn the subject of a separate contract. With all the differences between the actual contracts under which the several deliveries were to be made, the finding of an entire contract for the three months' deliveries cannot be supported.

IV

No agreement for March, 1919, deliveries of Army bacon was executed on behalf of the United States by any duly authorized contracting officer—the Court of Claims erred in holding the contrary

Mention already has been made of the letters of November 12, 1918, and December 10, 1918 (R-36, 37, 39), relied upon by the Court of Claims as constituting a contract for March, 1919, bacon. Attention has also been invited to the manner in which the two letters are, respectively, signed. The letter of December 10, 1918, is signed "By Authority of the Director of Purchase and Storage. A. D. Kniskern, Brigadier General, Q. M. Corps, Officer in Charge. By O. W. Menge, 2nd Lieut., Q. M. Corps." (R-39.)

The question is whether either of these officers had been authorized to contract on behalf of the United States; for lack of contracting authority in an officer pretending to represent the Government precludes the imposition of any liability on the United States, even under the Dent Act of March 2, 1919. *Baltimore & Ohio Railroad v. United States*, 261 U. S. 592.

The Secretary of War is, of course, the administrative head of the War Department. By Rev. Stat. 3744, it is made his duty to cause and require every contract made by him on behalf of the Government, *or by officers under him appointed to make such contracts*, "to be reduced to writing and signed by the contracting parties with their names at the end thereof." Rev. Stat. 3747, which was also a part of the original act of June 2, 1862 (12 Stat. 411), provides that: "It shall be the duty of the Secretary of War" to furnish every officer appointed by him with authority to make contracts on behalf of the Government with a printed letter of instructions, setting forth the duties of such officer, under the two preceding sections, and also with forms printed in blank of contracts to be made.

It is necessary at this point to refer to certain general orders of the Secretary of War and of the Quartermaster General, which the court below did not incorporate into its findings, but of which this Court will take judicial notice in accordance with the rule announced in many cases (*supra*, p. 18).

As hereinbefore stated, these general orders and regulations have been attached to this brief as an appendix (pp. 97-120).

The first regulation, in point of time, is paragraph 942, Manual for the Quartermaster Corps, 1916, which provides:

Contracts will be made in the name of, and will be signed by, the officer designated by

the chief of bureau to which the contracts pertain. They *will not be made at posts unless ordered by superior authority*, and they will not be so ordered unless the stores or services required, of proper quality or kind, can be procured as cheaply there as elsewhere.

This regulation was in force when we entered the World War, and the court below found as a fact that "the regular method of * * * letting contracts to the lowest bidders, if otherwise satisfactory, was adhered to, but later on, in 1917, and during 1918, the needs had so grown * * * that this method became impracticable" and resort was had to other purchase and procurement methods. (R. 31.)

The Court is reminded at this point that the Act of June 2, 1862, from which sections 3744 and 3747 were carried into the Revised Statutes, was enacted during the dark days of the Civil War, when the enemy was almost at the gates of the Capital, and for the purpose stated in *Clark v. United States*, 95 U. S. 539 (*supra* pp. 38, 39). The impracticability of complying with the sections during the World War would appear to be no greater than during the Civil War. In any event, war does not suspend the operation of the law, *Ex parte Milligan*, 4 Wall. 2. Moreover, no provision was made for waiving the requirements of said sections during war, as was done as to Rev. Stat. 3709, nor does the court find that either the President or the Secretary of War attempted to waive said requirements.

On the contrary, the Secretary of War, in compliance with the duty laid upon him by Rev. Stats. 3744 and 3747 (Appendix, p. 97), republished in General Order No. 47, dated May 11, 1918, Rev. Stats. 3744 to 3747, inclusive, for the information of all concerned and added:

Numerous failures on the part of contracting officers of the War Department to comply with the provisions of these statutes have been brought to the attention of the department. The chiefs of the several supply bureaus will insure a precise and immediate compliance with these statutes. All contracting officers of the War Department will familiarize themselves with these statutes and comply accurately with their provisions.

Again, by General Order No. 55, dated June 10, 1918 (Appendix, p. 99), the Secretary of War amended General Order No. 47 to read as follows:

No contract will be signed by an officer whose name does not appear in the body of the contract as the contracting officer. Contracts will be made in the name of, and will be signed by, the officers designated by the chief of the bureaus to which the contracts pertain, such appointments to be effective only after announcement of the names, rank, and contracting authorities of such officers by the chief of the bureau concerned. Any officer so appointed shall be designated in the contract itself as the contracting officer and shall make and per-

sonally sign contracts in his own name. This shall be strictly complied with. Paragraph 563, Army Regulations, requires that the officer signing the contract shall be the person who makes the affidavit of disinterestedness, and this paragraph shall be strictly complied with.

The court below does not refer to paragraph 942, Manual of the Quartermaster Corps, nor to either of General Orders, Nos. 47 or 55. It does refer to office order No. 491, Quartermaster General's office, dated July 3, 1918, as establishing a branch of the subsistence division in Chicago under the immediate direction and control of the depot quartermaster (R. 29) who was General Kniskern (R. 27), and seemed to conclude, on the basis of said order 491 and the general duties of General Kniskern that he was a contracting officer (R. 57 to 59). A copy of Order 491 is printed as an appendix (pp. 100-102), to this brief. *It will be noted that nowhere therein was General Kniskern appointed and designated with name, rank, and contracting authority as required by the prior General Order No. 55, of the Secretary of War.* It requires no argument to demonstrate that the Quartermaster General's order 491 could not overrule the Secretary of War's General Orders, Nos. 47 and 55, and a comparison of their terms show that there was no attempt to do so.

The truth seems to be that General Kniskern's duties were administrative and supervisory in character and that he had been at no time appointed

with name, rank, and contracting authority, in accordance with General Order No. 55, by either the Secretary of War or the Quartermaster General. Support for this view is found in Notice 179 of the Quartermaster General dated October 3, 1918, appointing Captain Shugert as contracting officer for the Chicago Supply Depot. A copy of this order is also printed in the appendix of this brief (pp. 103-115). Shugert had been appointed on September 17, 1918, as contracting officer for the packing house products and produce division of the office of the Depot Quartermaster at Chicago (R. 31). Purchase and Storage notice No. 109, dated December 2, 1918, which is also printed in the appendix to this brief (pp. 115-120), appointed Captain Shugert as contracting officer for the Chicago Supply Depot for Army subsistence, which included Army bacon. It is to be noted at this point that on November 7, 1918, the entire purchase, storage, and traffic divisions of the Quartermaster General's office had been reorganized into the office of the Director of Purchase and Storage. (R. 28.) The change in Captain Shugert's designation appears to have been made in conformity with the reorganizations effected in Washington. (R. 29, finding VI.) What is more, Captain Shugert actually signed the three contracts for the January and the one contract for the February, 1919, deliveries of bacon (R. 45); but no contract was signed by anyone for March, 1919, bacon (R. 45), unless the letter of December 10, 1918 (R. 39), constituted such a contract.

when considered in connection with Swift & Co.'s letter of November 12, 1918 (R. 36-37).

If, as suggested in the opinion below, Capt. Shugert's original designation as contracting officer operated only in a division of the Depot Quartermaster's Office which was separate from the division having jurisdiction over the purchases here involved, then it would necessarily follow that upon his transfer into a supposedly different division to which his former appointment did not apply, Capt. Shugert would have had no authority as a contracting officer.

At R. 30, after referring to numerous circulars providing an authoritative procedure in the purchase of supplies generally, the Court of Claims found that meat supplies were *not* specifically excepted from the provisions of these circulars, but that the necessities of the war period precluded their application.

It is evident that this finding cannot, and is not intended to, apply to the order of September 17, 1918, appointing Capt. Shugert as contracting officer, for the reason that his appointment in express terms made him contracting officer for the *packing-house products and produce division* of the Depot Quartermaster at Chicago.

Further, in the opinion below (R. 59-60), there is a discussion of the facts involved; and a distinction is made between the "*packing-house products branch of the subsistence division of the Quartermaster General's Office*," created July 3, 1918,

and the "*packing-house products and produce division of the Office of the Depot Quartermaster at Chicago.*" It was to the latter that Capt. Shugert was in formal terms assigned by the order of September 17, 1918.

The claimant further contends that the packing-house products and produce division of the Office of the Depot Quartermaster at Chicago became subservient to the branch created July 3, 1918. But Capt. Shugert's appointment as contracting officer was subsequent to July 3, 1918, namely September 17, 1918. Now, if the packing-house products and produce division, to which Capt. Shugert was assigned by formal order of subsequent date, did not purchase or have anything to do with the purchase of packing-house products, why did the War Department issue a futile order appointing him *contracting officer* in that division, at the same time leaving the packing-house products branch, subsistence division, which is supposed to have charge of such purchases, without a contracting officer? Also the findings make no reference to the orders of ^{December} September 2, 1918, and October 3, 1918. (*Supra*, p. 66.)

The facts will not permit the Government's contention to be disposed of upon the theory that the War Department intended to appoint a *contracting officer to purchase packing-house products in a division which had no authority to make such purchases.* The Government's position is confirmed when it is also remembered that when legal methods

of purchase were resumed by the Depot Quartermaster at Chicago, in the execution of formal contracts for January and February, 1919, *Capt. Shugert* (and *not* General Kniskern) executed those contracts, describing himself therein as *the contracting officer*.

On this state of facts, the most logical conclusion is that the Quartermaster's Depot disregarded the prescribed procedure in making contracts with this claimant for packing-house products, at least from September 17, 1918, until the consummation of negotiations leading up to the purchase and delivery of the January and February orders. But such a course of conduct will not suffice to create a binding contract out of informal letters (such as those of November 12th and December 10th, 1918), signed, formally by General Kniskern, but as a matter of fact by "O. W. Menge, 2nd Lieut., Q. M. C.," who by no course of reasoning can be considered a contracting officer. (R. 39.)

It is submitted that, even on this record, deficient as it is in fundamental findings of fact, but supplemented by the general orders and regulations herein referred to, which the Court may notice judicially, the evidence clearly shows that Capt. Shugert, and not General Kniskern, was the properly authorized contracting officer at Chicago from September 17, 1918, and thereafter throughout all the period here involved.

In *Hume v. United States*, 132 U. S. 406, 414, this Court said:

In order to guard the public against losses and injuries arising from the fraud or mis-

take or rashness or indiscretion of their agents, the rule requires of all persons dealing with public officers, the duty of inquiry as to their power and authority to bind the government; and persons so dealing must necessarily be held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal. *Whiteside v. United States*, 93 U. S. 247, 257; *United States v. Barlow, ante*, 271.

In *United States v. Martin*, 26 Fed. Cas. No. 15, 732, it is said:

The Government is not bound by the representations of its agent, except when it clearly appears that he was acting within the scope of his authority.

In *Hawkins v. United States*, 96 U. S. 691, it is said:

Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity; and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act.

See also *St. Louis Hay, etc., Company v. United States, supra*, where this Court said (191 U. S. 164):

The claimant was bound to know the law at its peril.

The law applicable to the exercise of authority by Government agents is too elementary and too thoroughly established to require extended citation before this Court.

On these principles, it is evident that no representations made by Government officials connected with either the office of the Depot Quartermaster at Chicago or the Chicago office of the packing-house-products branch of the subsistence division of the Quartermaster General's office, *other than Capt. Shugert*, as to their powers to purchase or to enter into contracts, formal or informal, can be binding on the Government. Nor can the claimant now be heard to say that it was ignorant as to the powers and duties of the Government agencies with whom it had dealt.

However, the defendant is not required to demonstrate that Shugert was the only duly appointed contracting officer for Army bacon on duty at Chicago in the zone supply office or the packing-house products branch of the subsistence division of the office of the Director of Purchase and Storage. (R. 28, 29.) It is sufficient to show that neither Kniskern nor Menge had been so appointed. *The court makes no finding with respect to Menge, who actually signed the letter of December 10, 1918.* (R. 39.) The only finding it made with respect to the contracting authority of Kniskern appears to be in Findings IV, V, and VI (R. 27, 28) and, as stated, the court seems to have concluded that his contracting authority was derived from office order No. 491, and his duties in charge of the Quartermaster Depot and the packing house products branch of the Quartermaster General's office in Chicago.

Defendant submits that said office order 491 did not appoint Kniskern as contracting officer, as required by the existing and paramount regulations of the Secretary of War; that it is entirely consistent with all of the facts found by the court and General Orders Nos. 47 and 55, to conclude that Kniskern's duties were administrative and supervisory in character, and that he was not a contracting officer. In any event, the signing of the letter of December 10, 1918, was in direct violation of General Order No. 55 of the Secretary of War, and was not a signing "by the contracting parties with their names at the end thereof," as required by Rev. Stat. 3744, and as contemplated by Rev. Stats. 3745, 3746, and 3747.

It is also to be noted that the Comptroller of the Treasury ruled in 26 Comptroller's Decisions, 367, that proxy signed contracts were invalid because the provisions of Rev. Stats. 3745 and 3746 "do not permit a signing by proxy." Proxy signed contracts arising prior to November 12, 1918, were adjusted and settled under the Dent Act of March 2, 1919 (40 Stat. 1272), by the Secretary of War as agreements not executed in the manner required by law. (Vol. 3, Decisions of the War Department Board of Contracts and Adjustments, pp. 279, 282, 6 *id.* 37; 8 *id.* 567.)

Defendant respectfully submits that the letter of December 10, 1918, was not signed by any officer authorized to contract on behalf of the United States; that in any event the signing was

not with the names of the contracting parties at the end thereof as required by Rev. Stat. 3744 and General Orders 47 and 55; and that consequently the contract relied upon does not comply with the law, is invalid, and the United States is not liable for the alleged breach thereof.

V

But if there was an entire agreement within the requirements of Rev. Stat. 3744, and executed on behalf of the United States by a duly authorized contracting officer, for Army bacon deliveries for the months of January, February, and March, 1919, it was abrogated or rescinded by the mutual consent of the parties in issuing proposals for bids, submitting bids, and entering into contracts as required by law for the January and February deliveries of bacon

Assuming *arguendo* that the letters of November 12 and December 10, 1918 (R. 36, 37, 39), constituted an *entire* contract for Army bacon for the months of January, February, and March, 1919, and that either Kniskern or Menge, whose names are appended to the letter of December 10, 1918, had been appointed pursuant to Rev. Stats. 3744 and 3747, as contracting officer on behalf of the Government, then it must be held that subsequent conduct of the parties constituted a rescission or abrogation of said contract by the mutual consent of the parties.

The court found that the Quartermaster General, or Director of Purchase and Storage, as he was then designated (R. 28, 29), telegraphed General Kniskern on December 16, 1918, that "Efec-

tive with January requirements, the Army will purchase packing-house products independently of Food administration. * * * You are authorized to proceed on this basis." (R. 44.) There *were* proceedings on this basis; for, on December 19, 1918, the Depot Quartermaster sent to Swift and Co. a circular proposal requesting it to submit bids for January deliveries. Said company did submit a bid and the price was agreed upon for the January deliveries. (R. 44.) A purchase order was issued therefor on January 4, 1919, but for "some reason not appearing was canceled and another was issued on February 10, 1919." (R. 44.) Subsequently three formal contracts for January deliveries were executed by Swift and Company and by "J. C. Shugert, Quartermaster Corps, U. S. Army" bearing date of February 10, 1919. These contracts were approved by the Board of Review in the office of the Director of Purchases. (R. 45.) A similar request for bids for February deliveries was issued on January 7, 1919 (R. 44), a purchase order or acceptance was issued on February 4, 1919 (R. 45), and a formal contract bearing date of February 4, 1919, was similarly executed by Captain Shugert as contracting officer and approved by the Board of Review (R. 45). This was the procedure followed in the early stages of the War (R. 31), and the execution of the contracts in accordance with law was in compliance with General Orders, Nos. 47 and 55 (Appendix pp.

97, 99), and paragraph 942, Manual for the Quartermaster Corps (*supra*, p. 62).

These facts are similar to the facts in *Brown v. District of Columbia*, 127 U. S. 579, where it was alleged that a letter quoted at pages 580 and 581 of the report of the case constituted a contract for laying a number of yards of paving blocks. It was further shown that, subsequent to said letter, five written contracts were entered into for laying part of the blocks (p. 585) covered by the letter. This Court there said (page 587) that:

The refusal of the board to accept any of the work, or to allow any certificate of its amount to be given until after other contracts, entirely different in terms, were duly entered into, and bonds were given for their faithful performance, negatives any suggestion of recognition or ratification by the District of Columbia of the alleged contract of December 10th, 1872, or of any acquiescence in its part performance. This claim is utterly inconsistent with the conduct of the company. *The very fact that it entered into these other contracts, different in terms from the alleged contract of December 10th, 1872, and accepted the certificates of the board issued for the work done under those contracts (and those alone) proves that it did not regard the verbal negotiations with Shepherd, and the unauthorized letter of Johnson thus disavowed by the board, as binding upon the District of Columbia.* (Italics ours.)

There is no statute requiring bonds to be given for the performance of War Department subsistence contracts, and the findings of the court below are silent as to whether bonds were furnished by Swift and Company for the alleged contracts for the January and February bacon. However, said prior contracts admittedly cover the January and February deliveries (R-44, 45) included in the letter of December 10, 1918 (R-39), which with Swift and Co.'s letter of November 12, 1918, was relied upon by the Court of Claims as constituting an *entire* contract. (R. 64, 72, 73.)

If it be true that the letters of November 12 and December 10, 1918, constituted an *entire* contract for a quantity of Army bacon, to be delivered during each of the three months of January, February, and March, 1919, we submit that the entering into three separate contracts for the part of the bacon delivered in January and into one contract for the part of the bacon delivered in February constituted a rescission or abrogation of the prior contract. The execution of contracts in accordance with Rev. Stat. 3744, and General Orders 47 and 55, for the January and February deliveries shows that all concerned did not regard the letters of November 12 and December 10, 1918, as constituting a contract good in law for the bacon for those two months. *If not good for these two months, it was certainly not good for the third month.*

The performance of the three contracts for January and the one contract for February, 1919, deliveries, executed on behalf of the United States by Captain Shugert, would not appear to be a partial performance of the alleged prior *entire* contract signed by A. D. Kniskern, etc., by O. W. Menge. In other words, the judgment of the court below against the United States for damages by reason of the failure of the Government to accept and pay for March, 1919, deliveries of bacon, appears to be erroneous from whatever angle the matter may be viewed.

VI

The court erred in holding that the claimant used due diligence in disposing of Army bacon Serial 10 in the United States, and in applying the wrong measure of damages to the facts disclosed

The pertinent facts disclosed by this record are as follows:

The claimant was advised by General Kniskern's letter dated January 24, 1919 (R. 40), that his office *would not be in the market* for bacon for delivery during March, 1919. He further advised: "such quantity of bacon as is now in process of cure over and above the quantity of bacon necessary to take care of February awards, and which has been passed by inspectors of this office, will be accepted."

On March 5th, under erroneous date of February 5, 1919, he further advised that none of the Army bacon over the quantities noted on February

contracts "will be required by this office," and that production should immediately cease. But he further stated: "Should, however, you have any issue bacon which is now in smoke and which is in excess of the amount required for February delivery, same will be accepted." (R. 42.)

Responding to a letter from claimant dated March 14, 1919, General Kniskern advised that it would be impossible for his office to receive any bacon for which purchase orders had not been prepared, and that "as soon as agreement is reached as to price and purchase orders have been prepared, shipping instructions will be furnished." (R. 47.)

However, by letter dated April 24, 1919, he further advised that his office was taking steps toward adjustment for materials on hand to be applied against March deliveries, "which allotments were cancelled," and requested a representative of the claimant to be present at his office on April 29th in order to be fully informed as to methods to be followed in submitting its claims. (R. 47.)

On April 29, 1919, he sent the claimant papers "necessary to prepare in order to file a claim for any amount you may consider due from the various packing-house commodities allotted you for delivery during March, 1919, and on which you will suffer a loss *by reason of cancellation of those orders.*" (R. 48.)

By virtue of these last two letters, the claimant was fully notified that no part of the bacon prepared

for March delivery would be accepted by the Government, and that March allotments had been cancelled.

On August 29, 1919, General Kniskern wrote the claimant, among other things, that he could not conduct negotiations as to the adjustment of "the informal contracts" until the claim had been assigned to his office, and "it will not be possible for the Government to dispose of them (the bacon) until the negotiations are completed and the actual ownership determined by the Government, taking them at the agreed price or turning them over to you on a basis similar to the salvage basis of unfinished material." (R. 48, *supra*, p. 16.)

He follows this with unauthorized suggestions as to the disposition of the bacon, leaving no room for doubt that the claimant had always been at liberty to dispose of it in some method or other. He states that he can not give positive instructions as to the disposal "of *any* of this product which at this time may be in your possession," and then uses language which undoubtedly recognized the claimant's existing right to dispose of it. (R. 48.)

It can not be held that the Government ever turned this bacon over to be handled for its account. This is shown by General Kniskern's letter of August 29, 1919 (R. 48), where he states that no such procedure could be adopted until after determination by negotiations.

Nothing can be found in the findings of fact to show that the Government prohibited or prevented

the claimant from establishing the market value to be relied upon in a claim for damages, by a sale either at or near the time either of delivery or of cancellation of the contract.

Whatever the status of negotiations between General Kniskern and the claimant prior to April 24, 1919, it is evident that on that date the claimant was definitely advised that no part of the bacon put up for March delivery would be accepted by the Government.

The record further shows (R. 49) that not until September, 1919, did the claimant actually begin to dispose of the bacon which the Government had refused to accept on April 24th. In other words, *nearly five months intervened between the cancellation of the order and the practical attempt to dispose of the rejected product.*

Furthermore, the record discloses (R. 50) that the price of hogs, upon which were based, to a large extent, the cost and the selling price of the finished product, *advanced* throughout the first seven months of 1919, and that thereafter, until January, 1920, the price continued to *decline*.

Under these conditions, it is respectfully submitted, there can be no practical application of the rule that a vendor's measure of damages is the difference between the contract price and the market price, *as shown by a sale made under conditions which establish that market price.* The sale was here made about five months after the original date

of delivery. During a great part of those five months, the raw material market would naturally have functioned to the benefit of the vendee. At the end of those five months, the raw material market was declining, and continued to decline throughout the time of the sales. Yet the only market price disclosed by the record is based upon sales made between September, 1919, and October, 1920, at a time when the market was far less favorable to the defendant than in March, 1919 (the time of delivery). On the question of the market price in March, 1919, the record is absolutely silent.

It is submitted that where the record is thus deficient there can be no recovery.

In *Shepard v. Hampton*, 3 Wheat., 200, Chief Justice Marshall said:

The only question is, whether the price of the article at the time of the breach of the contract, or at any subsequent time, before suit brought, constitutes the proper rule of damages in this case. The unanimous opinion of the court is, that the price of the article, *at the time it was to be delivered*, is the measure of damages.

While General Kniskern, in his letter of August 29th, indicated the prices then being received by the Government for bacon of this character, these prices were made in a market nearly five months after the notice of cancellation, and more than five months from the date of delivery. His letter, therefore, can not be treated as proof from which to determine the market value in March or April.

In *Smith v. Pettee*, 7 Hun. (N. Y.) 334, 335, the court said:

But to conclude the purchasers by the result of such a sale it should take place as soon after the refusal to accept the property as that could practically be made. That was not done in this case, but the iron was retained in store by the plaintiffs for a period of very near four months, and during this time the market price of that description of iron was continually depreciating. * * * They could not keep it in store for months as they did and then charge the loss caused by that delay upon the purchasers, for to that extent it was not the consequence of the defendants' fault but of the plaintiffs' injudicious delay in the sale of the property.

Warren v. Stoddart, 105 U. S. 224, 229, declares that it is the plaintiff's duty to avoid consequential damages so far as reasonably possible. No action can be maintained for alleged losses which were increased through failure by the plaintiff to dispose of the product within a reasonable time after the breach. The claimant in this case can not keep the property for an unreasonable time and then dispose of it on a declining market, and then seek to bind the Government by the price obtained in such circumstances.

In *Friedenstein v. United States*, 35 Ct. Cls. 1, 8, the court said:

It then (upon the breach) became plaintiff's duty to sell such copper as he had

on hand (if he had any) within a reasonable time if he expected to hold the Government liable for damages for breach of contract. We think the breach fairly dated from that time.

But plaintiff took no action, made no effort to save himself from loss, retained presumably whatever copper he had on hand until the price went down, and then brought suit.

There are no facts disclosed by this record which establish that the prices obtained from September, 1919, to January, 1920, were the same, or approximately the same, as would have been obtained by a sale immediately subsequent to the cancellation of the alleged order in April, 1919. The actual prices obtained ranged from 33½ cents down to 22½ cents per pound in sales. The bulk of the sales were made before February, 1920; but they were not entirely completed before October, 1920. (R. 49.)

The court below appears to hold that the claimant is entitled to the benefit of full performance as to the bacon which was prepared for delivery in March and which was subsequently sold as above stated. It applies a measure of damage which consists of the contract price of that bacon (made up of the alleged cost of production plus a certain profit), less the net value received by the claimant on resale; or in other words, less the salvage value as established by sales made from five to thirteen

months after the alleged default. The claimant's petition was based upon several different theories as to its cause of action. But the judgment is predicated only upon an express contract, bringing the cause of action within the general jurisdiction of the Court of Claims, under Section 145 of the Judicial Code. It is therefore essential to ascertain what contract, if any, is actually the basis of the present judgment. So far as can be gathered from the opinion, the court below substantially predicates its judgment upon an express contract embodied in letters dated November 12, 1918, and December 10, 1918, passing between the claimant and General Kniskern. But it is clear that there never was any performance of this alleged contract by way of *complete* manufacture and tender of the manufactured article.

Further, the court below (R. 73) treats General Kniskern's letters of January 24, 1919, and March 5, 1919, as in some degree *modifying* the contract embodied in the earlier letters. But the claimant has never contended that the letters of January 24th and March 5th constituted a contract of any kind. Certainly they do not constitute a contract in writing, of the type required by statute to bind the Government. As a matter of fact, the claimant disavowed any such contention in the court below.

In April, 1919, when the contract was cancelled, the bacon here involved was in existence. The question then arises as to what is the proper measure of damage to be applied. To establish this,

there must be a finding that there was a *market price* for this bacon immediately after notice of cancellation of the order. Such a finding is nowhere in the record. There are no facts found, beyond the facts with reference to the cost of raw material (hogs), which in any way establish the true relation of the market price in March or April, 1919 (the time of the breach), to the market price in September or December (the time of alleged sale).

Two questions will be considered, namely, (1) what is the proper measure of damages to be applied under these conditions, and (2) if the difference between the contract and the salvage value is the measure to be applied, whether there is any duty of due care and diligence imposed on the vendor in making the salvage sale.

Referring to the first of these questions, in 2nd Benjamin on Sales, 3rd edition, p. 1075, Sections 1011, 1012, it is stated:

Where a contract to deliver goods at a certain price is broken, the proper measure of damages, in general, is the difference between the contract price and the market price of such goods *at the time when the contract is broken*, because the purchaser, having his money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them. The

date at which the contract is considered to have been broken is that at which the goods were to have been delivered, not that at which the buyer may give notice that he intends to break the contract and to refuse to accept the goods.

In *Friedenstein v. United States*, 35 Ct. Cls. 1, 8, the Court said:

The measure of damages for the refusal of a purchaser to receive a commodity under a contract of sale is the difference between the contract price and the market price *at the time and place of the breach of the contract*.

In *Harkness v. Russell*, 118 U. S. 663, 667, the Court said:

Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale.

Under an executory contract, where a manufacturer agrees to make an article for the buyer, which the latter refuses to accept, the measure of damages uniformly applied is the market value *at the time when the article should have been accepted*. *Carpenter v. First National Bank*, 119 Ill., 353, syl. 6; *The Pittsburgh, Cincinnati & St. Louis R. R. Co. v. Heck*, 50 Ind. 303; *Dollman v. Studebaker*, 52 Ind. 286; *Fell v. Muller*, 78 Ind. 507, and cases cited.

Malcomson v. Reeves Pulley Company, 167 Fed. 939, 93 C. C. A. 339 (decided by Circuit Judge Severens and District Judges Knappen and Sanford), involved the purchase of 500 "air-cooled" automobile engines to be built for the purchaser and shipped in specified quantities at various times at a stated price. It was proven at the trial that the manufacturer had made all reasonable efforts to sell to third parties the balance of the engines called for by the contract which the purchaser had declined to accept and pay for. The manufacturer was unable to resell more than a limited number of the motors. It was not clear whether more than 400 of the 500 engines had been made, because the manufacture of "air-cooled" motors had been discontinued in favor of the water-cooled type. In this respect, the case was closely analogous to the case at bar; for here the manufacture of "Army" bacon had been abandoned in favor of the somewhat different "commercial" type. (R. 50.)

In treating of the measure of damages, the court said (167 Fed. 939, 942):

The measure of damages for the refusal of a vendee to accept a completely manufactured article *is not the purchase price, but is the difference between the purchase price and the market value at the time and place when acceptance is required.* This proposition is too well settled to require elaboration or to justify more than the merest reference to authority. See *Peters v. Cooper*, 95 Mich. 191, 54 N. W. 694; *Yellow Poplar Lumber*

Co. v. Chapman, 74 Fed. 444, 20 C. C. A. 503; *Southern Cotton Oil Co. v. Heflin*, 99 Fed. 339, 39 C. C. A. 546, and cases cited. [Italics ours.]

It is conceded that there is a difference between "commercial" bacon and "Army" bacon, and that the market for "commercial" bacon is much larger and purchasers more numerous. But, as shown by this record, a market did exist upon which to establish the value of "Army" bacon also. The preparation of Army bacon, an edible commodity (designated "a valuable food product" in General Kniskern's letter of August 29, 1919), in principle, is not comparable either to the construction work involved in large buildings or public works, or to the production of intricate machinery intended for the special use of the vendee under conditions peculiar to his necessities and for which no other purchasers can be found. There is no such difference between "Army" bacon and "commercial" bacon (both being food products available for general consumption) as would require the application of a special measure of damages, different from that applied to ordinary commercial contracts. To the extent that "commercial" bacon is more readily marketable than the "Army" type, the difference is reflected in the prices of each.

Reliance has been placed by the claimant upon *United States v. Behan*, 110 U. S. 338; *Hinckley v. Pittsburgh Steel Company*, 121 U. S. 264; and

Frederick v. American Sugar Refining Company,
281 Fed. 305.

The *Behan* case involved a contract with the Government for construction work in connection with harbor improvements at New Orleans. The claimant had made preparations and incurred expenses in connection with the machinery, materials, and labor necessary to fulfill the contract. It was then determined that the proposed work was inadvisable. The contract was cancelled and the claimant was ordered to cease work.

The court held that the claimant's damages consisted of two items: First, his outlay and expense, less the value of materials on hand; second, the profits he might have realized by performance. No profits, however, could be established. It will be noted that this case involved construction work of a peculiar type, where, by no possibility, could the ordinary measure of damages be applied. The construction work there involved is in no way comparable to the preparation and sale of Army bacon, especially where a market value of the bacon can be established by sale.

The *Hinckley* case, *supra*, is more clearly analogous to the case at bar, but there is still a distinction. The facts there were that a Steel Company had sold to Hinckley certain quantities of steel rails which were to be "drilled as may be directed." The vendee refused from time to time to give instructions as to the drilling. The evidence was that the drilling on steel rails required by various railroads

differed, and that there was no standard form of drilling which permitted the completion of the contract according to its terms in the absence of instructions from the vendee. The vendee indicated his determination not to receive the rails. The rails were never manufactured according to the terms of the contract.

The measure of damages applied under those conditions was the contract price less the ascertained cost of production, if the rails had been completed, less the profits received by the vendor from the sale of other products made from a portion of the steel purchased to comply with the contract.

It will be noted that the action of the vendee prevented the manufacture of any part of the rails involved in the contract, and that therefore there could never have been a resale to ascertain their market value. But, in the case at bar, so far as it concerns the Army bacon disposed of by the claimant, the manufactured product was in existence when the order was cancelled. There was no reason why the market value could not have been ascertained by a *prompt* sale so that the ordinary measure of damages could be applied. In the *Hinckley case* it will be noted that, due to the refusal of the vendee to give specifications essential to the completion of the contract, the exact terms of the contract could not be fulfilled. In the case at bar, complete preparation of the bacon rested with the vendor, and the Government did nothing to prevent the

sale upon the open market of the bacon already prepared.

If the *Hinckley case* gives the general rule as to the measure of damages, it is difficult to see what becomes of the long line of established decisions which fix the measure of damages at the difference between the contract price and the market price *as of the date and place of delivery or breach*.

The special rule as to the measure of damages for the nonacceptance of articles manufactured especially to fill an order, rests not so much upon the fact of production as upon the fact that the article produced, being designed for a special purpose and a special person, cannot readily be resold as an article of commerce, since it has no "market" value.

Frederick v. American Sugar Refining Company, supra, involves the partial acceptance by the Circuit Court of Appeals for the 4th Circuit of a measure of damage laid down by the Supreme Court of Appeals of Virginia. The vendor had completed production of the article ordered, and had made tender and delivery according to the exact terms of his contract. Delivery was refused by the vendee. The Virginia court held that the vendor had a right to sue for the contract price of the goods, and thereafter *at any time at his election to make a resale*, crediting the vendee with the net proceeds of the resale. The Virginia court further held that the vendor had a right to make such sub-

sequent sales *at any time he might elect*, by virtue of his lien upon the goods.

In the first place, it is to be observed that in the case at bar there was never any completion of the exact terms of the alleged contract, nor was there ever any complete tender to the Government of the goods which were the subject of that contract. It is true that, in all probability, subsequent completion and tender would have been made but for the fact that the Government agent notified the claimant to cease to produce. But it is evident that if the claimant desired to make application of the rule stated in the case just cited, he must have proceeded to full execution of the contract and tender thereon.

The opinion in the *American Sugar Refining Company case*, *supra*, at pages 309-310, shows that the authorities relied upon for the measure of damage there stated, are entirely decisions by courts of various States, and do not reflect decisions of Federal courts.

In the *Malcomson case*, at page 942 (*supra*, p. 87), it is apparent that the measure of damage there set out is based largely upon decisions of Federal Circuit Courts of Appeals.

From the opinion in the *American Sugar Refining Company case* (p. 309), it is further apparent that the court did not adopt *in toto* the rule laid down by the Virginia Court of Appeals, to the effect that the vendor has the right *at any time at his unrestricted option* to make sale of the rejected product for the account of the vendee.

The court said (281 Fed. 309):

Just a word should be said, perhaps, as to the time in which the resale was made. While there was considerable time between August and December, 1920, when the first sale was had, it will be found upon careful examination of the facts that it would have been impracticable to have made sale of the abandoned sugar between August and November, on account of the fluctuating market, and, indeed, lack of a market at all, and in the interim the defendant was kept advised of his continuing default, and given full and ample opportunity to protect himself at the sales as soon as it was practicable to make the same, which took place in December and January, *and as early as the court believes, from the whole testimony, it was judicious to make the same.* Certainly nothing occurred in connection with the resale to relieve the defaulting vendee from responsibility, and placing the same upon the vendor. [Italics ours.]

It is respectfully submitted that the facts in the case at bar as to the subsequent disposition of the army bacon manufactured for March delivery show conditions entirely different from those referred to in this quotation.

In the case cited, the court found that there was *no market substantially in existence* for the sale of the sugar prior to the actual resale made by the vendor. This, of course, would have prevented a

resale establishing a market price *as of the same time and under the same conditions* as at the date of the breach. In the case at bar, the weight of the evidence is that there *was* a market for the sale of Army bacon at the time of the breach, under conditions more propitious than those which existed five months later, when it was resold at continually decreasing prices. There was unnecessary and injurious delay in the disposition of the bacon by the claimant. There were no reasons disclosed why the claimant should not have made prompt disposition and sale immediately after the express notice of cancellation of the March order. The findings of fact do not give rise to a legal excuse for not making prompt sale. General Kniskern's letter of August 29, 1919, can not, by any construction of language, be held to indicate that the Government either forbade, or objected to, prompt sale.

In *Guy v. United States*, 25 Ct. Cls. 61, 68, the Court of Claims went so far as to say that a vendor to the Government of a certain amount of oats, part of which had been delivered, could not recover damages after cancellation of the contract as to the undelivered portion, although "apparently acting upon the encouragement orally given to him that the defendant might take the oats at some future time." The vendor, after three months' delay, sold the undelivered oats upon a decreasing market

price, without notice to the Government. His right of recovery was denied.

It is true that in the letter of August 29, 1919, General Kniskern expressly stated his lack of authority to give any instructions as to a sale. But, unofficially, and as a personal opinion, he suggested the sale of this bacon *in the United States*. In view of his express denial of authority to give advice, the claimant, in making a sale, must be held to have acted of its own volition and without notice to this defendant.

In conclusion, it is submitted that the court below erred in finding that the claimant had exercised due diligence in the disposition of that part of the bacon which was sold in the United States. It was likewise error to establish a measure of damages in this case, other than the general rule, established by the weight of authority, that the measure of damages is *the difference between the purchase price and the market value of the goods at or about the time and place of delivery or alleged breach*. Since the claimant did not establish the market price by a sale substantially as of the time of cancellation of the alleged order, and since the record does not otherwise establish that price, the claimant has not proved his damages, and can not recover.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court below erred in entering judgment for the claimant on its petition. The

judgment of the Court of Claims should be reversed; and the petition should be dismissed.

WILLIAM D. MITCHELL,

Solicitor General.

WILLIAM J. DONOVAN,

Assistant to the Attorney General.

ABRAM F. MYERS,

RUSH H. WILLIAMSON,

Special Assistants to the Attorney General.

NOVEMBER, 1925.

APPENDIX

GENERAL ORDERS }
No. 47 }

WAR DEPARTMENT,
Washington, May 11, 1918.

* * * * *

V-1. Revised Statutes 3744 to 3747 provide as follows:

SEC. 3744. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return. (See Secs. 512-515.)

SEC. 3745. It shall be the further duty of the officer, before making his return, according to the

preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths:

I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with _____; that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said _____, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.

SEC. 3746. Every officer who makes any contract and fails or neglects to make return of the same according to the provisions of the two preceding sections, unless from unavoidable accident or causes not within his control, shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than five hundred, and imprisoned not more than six months.

SEC. 3747. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to furnish every officer appointed by them with authority to make contracts on behalf of the Government with a printed letter of instructions, setting forth the duties of such officer under the two preceding sections, and also to furnish therewith forms, printed in blank, of contracts to be made, and the affidavit of returns required to be affixed thereto, so that all the instruments may be as nearly uniform as possible.

Extract from Chapter 29, 1st Session, 1917. June 15, 1917. (House Resolution 3971.) Statutes, 1917, p. 198:

SEC. 3744, Revised Statutes, is hereby amended by adding the following at the end of the last sentence:

Provided, That the Secretary of War or Secretary of the Navy may extend the time for filing such contracts in the Returns Office of the Department of the Interior to 90 days whenever in their opinion it would be to the interest of the United States to follow such a course.

2. Numerous failures on the part of contracting officers of the War Department to comply with the provisions of these statutes have been brought to the attention of the department. The chiefs of the several supply bureaus will insure a precise and immediate compliance with these statutes. All contracting officers of the War Department will familiarize themselves with these statutes and comply accurately with their provisions.

(160.14, A. G. O.)

By Order Of The Secretary Of War:

PEYTON C. MARCH,

Major General, Acting Chief of Staff.

Official:

H. P. McCAIN,

The Adjutant General.

GENERAL ORDERS,

No. 55

WAR DEPARTMENT,

Washington, June 10, 1918.

* * * * *

VII. Paragraph 2, section V, General Orders, No. 47, War Department, 1918, is amended to read as follows:

No contract will be signed by an officer whose name does not appear in the body of the contract

as the contracting officer. Contracts will be made in the name of, and will be signed by, the officers designated by the chief of the bureaus to which the contracts pertain, such appointments to be effective only after announcement of the names, rank, and contracting authorities of such officers by the chief of the bureau concerned. Any officer so appointed shall be designated in the contract itself as the contracting officer and shall make and personally sign contracts in his own name. This shall be strictly complied with. Paragraph 563, Army Regulations, requires that the officer signing the contract shall be the person who makes the affidavit of disinterestedness, and this paragraph shall be strictly complied with.

(062.1, A. G. O.)

* * * * *

By Order Of The Secretary Of War:

PEYTON C. MARCH,
General, Chief of Staff.

Official:

H. P. McCAIN,
The Adjutant General.

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER
GENERAL OF THE ARMY,
Washington, July 3, 1918.

OFFICE ORDER No. 491.

Subject: Packing-house products branch of the Subsistence Division, Office of the Quartermaster General.

1. There is established in Chicago a packing-house products branch of the Subsistence Division

in the Office of the Quartermaster General. This branch shall be located in the general supply depot of the Quartermaster Corps at Chicago, and shall be under the immediate direction and control of the depot quartermaster.

2. The packing-house products branch shall be responsible for all matters pertaining to the procurement, production, and inspection of packing-house products.

3. In the performance of its duties this branch shall receive such requisitions and make such purchases of packing-house products as may be designated from time to time by the Office of the Quartermaster General. In this connection the branch will either prepare the purchase orders or contracts, as the case may be, or, if the circumstances make it desirable, may, at the option of the branch, delegate this duty to depot or other quartermasters.

4. It shall be the duty of this branch to supervise all matters pertaining to the production of packing-house products, and in this connection it shall have supervision over such inspectors as may be assigned to it, shall assign such inspectors to duty in the several zones as may be required, and may transfer inspectors from one zone to another.

5. All purchase orders or contracts made by this branch shall be transmitted to the general supply depot in whose zone the products are to be prepared; and the quartermaster directing such depot shall, under the supervision of the branch, have immediate charge of all matters pertaining to preparation, inspection, delivery, storage, shipment, and payment as if the purchase had been made by him.

6. The performance of the foregoing duties is subject to the control of the Office of the Quartermaster General.

By authority of the Acting Quartermaster General.

BENJ. L. JACOBSON,
Major, Q. M. R. C., Acting Executive Officer.

Paragraph 724, Manual for the Quartermaster Corps:

A. Proposal and acceptance agreements or circular proposals and letters of acceptance may be used in contracting for any supplies or services, *except* where the construction, repair, or alteration of public work (including vessels), is involved, to be procured by the Quartermaster Corps (and such agreements will constitute valid binding contracts) when—

1. The amount involved does *not exceed \$500*, irrespective of the time required for completion; or

2. The time required *for completion* is not more than 60 days, and the amount involved does not exceed \$5,000. (Italics ours.)

B. Contracts reduced to writing and signed by the contracting parties *with their names at the end thereof* shall be used in all cases when the transaction involves—

1. An amount of more than \$5,000, irrespective of time required for completion.

2. Construction, repair, or alteration of public works (including vessels), except when amount involved does not exceed \$500 and transaction is an open-market purchase.

C. Contracts reduced to writing and signed by the contracting parties with their names at the end

thereof may be used in such other cases as, in the judgment of the contracting officer, may be essential to the best interests of the United States.

Effective August 27, 1917, and continuing during the present emergency, the provisions of this paragraph are suspended in so far as requires the making of the usual formal contract for purchase of supplies when the amount involved is more than \$5,000 and the time for delivery does not exceed 30 days. When under such limits agreements for procurement of supplies may be made in accordance with a short form, authorized for the purpose, similar to proposal and acceptance agreements.

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER
GENERAL OF THE ARMY,
Washington, October 3, 1918.

Notice No. 179.

Subject: List of Purchasing and Contracting Officers.

1. As provided in paragraph 5 of this Notice No. 66, from the office of the Quartermaster General, dated August 7, 1918, the following officers have been nominated and appointed as Purchasing and Contracting Officers for the places and stations indicated, such appointments being with general contracting powers and for an indefinite period of time, unless otherwise stated:

PROCUREMENT DIVISIONS, O. Q. M. G.

Clothing & Equipage Division:

Major H. M. Schofield.

Capt. Albert J. Farnsworth.

Leather Subdivision, C. & E. Div.:

Lt. Col. G. N. Goetz.

Capt. A. F. Cochran.

Capt. J. D. Goodpasture.

Conservation & Reclamation Division:

Lt. Col. P. N. Merzigg.

Major W. Lester

Fuel & Forage Division:

Lt. Col. U. G. Lyons.

Major John Roberts.

Capt. L. E. Molineaux.

Hardware & Metals Division:

Major E. A. Darr.

Major H. P. Hill.

Lt. Carl W. Bliss.

Remount Division:

Col. W. S. Valentine.

Col. A. M. McClure.

Maj. E. O. Trowbridge.

Maj. C. L. Scott.

Capt. E. B. Allen.

Capt. J. W. Appleton.

Capt. Brook^o Baker.

Capt. Archibald Barklie.

Capt. Frank Barr.

Capt. R. A. Baxter.

Capt. B. A. T. Bell.

Capt. Geo. A. Bell.

Capt. W. S. Cameron.

Capt. Benj. Chew.

Capt. N. V. Colt.

Capt. T. E. Davis.

Capt. Wirth S. Dunham.

Capt. H. W. Frost.

Capt. Fletcher Harper.

Capt. A. H. Higginson.
 Capt. Spaulding H. Jenkins.
 Capt. J. J. McCartney.
 Capt. H. S. Neilson.
 Capt. Clarence Robbins.
 Capt. Q. A. Shaw.
 Capt. St. Clair Street.
 Capt. F. S. Von Stade.
 Capt. Howard Willett.
 Lt. M. O. Knott.
 Lt. M. C. Law.
 Capt. M. M. Smith (Eastern Purchasing Zone).

GENERAL SUPPLY AND SUBDEPOTS

Atlanta, Ga.:

Lt. Col. G. R. Gray.
 Maj. Geo. M. Alden.
 Capt. Louis W. Winterberger.

Baltimore, Md.:

Maj. J. E. Schiller.
 Maj. A. M. Miller.

Expeditionary Depot:

Maj. J. H. Ross.

Boston, Mass. (Cambridge):

Col. A. W. Yates.
 Maj. W. K. Nash.
 Capt. T. G. Turner.

Chicago, Ill.:

Maj. Chas. Caswell (Hardware & Metals).
 Maj. Geo. F. Mayer (Clothing & Equipage).
 Maj. Geo. E. McGowan (Subsistence).
 Maj. E. J. Zimmerman (Conservation & Reclamation).
 Capt. Langhorn Allen (Motors).

Capt. G. W. Cook (Subsistence).

Capt. Seymour Morris (Construction & Repair).

Capt. J. C. Shugert (Subsistence).

Lt. Jean A. Crandall (Vehicles & Harness).

Lt. M. R. Upton (Fuel & Forage).

El Paso, Tex.:

2nd Lt. L. D. Lawson.

Fort Sam Houston, Tex.:

Capt. T. O. Baker (Subsistence).

Capt. F. M. Kerr (Clothing & Equipage, Misc.).

Lt. J. W. Coyle (Fuel & Forage).

New Orleans, La.:

Capt. P. T. Murphy.

Newport News, Va.:

Capt. Melvin R. Ginn.

Lt. Harry W. Bryan (Subsistence).

New York City:

Capt. John R. Holt.

Philadelphia, Pa.:

Lt. Col. John S. E. Young.

Capt. Jos. L. Blayboek.

Expeditionary Depot:

Col. J. B. Houston.

Capt. D. L. Coulborn.

San Francisco:

Col. G. S. Bailey (Misc.).

Maj. M. L. Gerstle (Clothing & Equipage).

Capt. H. M. Weidenfeld (Subsistence).

St. Louis:

Maj. Robt. Field.

Washington, D. C.:

Capt. H. A. Barnard.

Brownsville, Texas:

Capt. Edward T. Burnley.

Kansas City, Mo.:

Lt. W. E. LaRoe.

Lt. Carl W. Allison.

Los Angeles, Cal.:

Col. Wm. G. Gambrill.

Capt. Peter Hanses.

Marfa, Tex.:

Maj. Carl A. Hardigg.

Portland, Ore.:

Lt. Col. Sam R. Jones (Leases).

Capt. Wm. J. Lindenborg.

Capt. Chas. Steinhauser (Misc.).

Seattle, Wash.:

Col. Geo. Rhulen.

Dallas, Tex.:

Lt. Q. T. Gobrecht.

Remount Depot, Front Royal, Va.:

Capt. LeRoy S. Barton.

DEPARTMENTS

Eastern:

Col. Robert S. Smith.

Northeastern:

Capt. J. H. Lane.

Southern:

Lt. Edward Mechling.

Southeastern:

Col. R. N. Thomas.

Hawaiian:

Maj. Fred S. Buckley (Mise. Supplies).

Capt. H. W. Murray (Construction & Repair).

COAST ARTILLERY DISTRICTS

North Atlantic:

Lt. Col. E. D. Powers.

South Atlantic:

Capt. Robt. H. Van Volkenburgh.

Camps

Camp Beauregard, La.:

2nd Lieut. Wm. R. Goldberg.

Camp Bowie, Texas:

Capt. A. W. Stanley.

Camp Cody, N. M.:

Capt. Geo. Nash (Aux. Remount).

College Station, Texas:

Lt. Wayne C. Whatley.

Corpus Christi, Texas:

Capt. W. N. Curtis.

Camp Custer, Mich.:

1st Lt. E. E. Follin.

Del Rio, Texas:

Capt. Jas. A. Massa.

Camp Devens, Mass.:

Col. Maurice O'Connor (Subsistence).

Capt. Harry B. Parker (Supplies, except Subsistence).

Camp Dick, Texas:

Capt. D. S. Bliss.

Camp Dix, N. J.:

Capt. Wm. Bethke.

Camp Jackson, N. C.:

1st Lt. Hubert P. Williams.

Camp Jos. E. Johnston, Fla.:

Maj. C. B. Franke.

Camp Kearney, Calif.:

Maj. Frank P. Tingley.

2nd Lt. Robt. G. Thorpe.

Las Casas, P. R.:

Capt. L. D. Barr.

Camp Lewis, Washington:

Lt. Col. Jas. H. Como.

2nd Lt. Jas. L. Patterson (Aux. Remount).

Camp MacArthur, Texas:

Maj. H. W. Hardeman.

Capt. R. L. Fain.

Capt. D. Van Gelder.

Capt. Goeffrey L. Lyon (Aux. Remount).

Camp Dodge, Iowa:

Capt. C. J. Falkenthal.

Camp Fremont, Calif.:

Capt. Raymond Boyd.

Camp Funston, Kans.:

1st Lt. John M. Reardon.

Camp Gordon, Ga.:

Capt. LeRoy M. Woerner.

1st Lt. Henry M. Green.

1st Lt. John G. D. Hightower.

Capt. Chas. Mayer (Aux. Remount).

Camp Greene, N. C.:

Maj. S. J. Seals.

Capt. Chas. M. Miller (Except Subsistence).

Capt. Robt. P. Roloff (Utilities supplies).

2nd Lt. Jacob I. Goodstein (except Subsistence).

2nd Lt. Fred R. Hudson (Subsistence)

Camp Hancock, Ga.:

Maj. Alexander Fitz-Hugh.

Capt. C. S. Warshauser.

Camp Humphreys, Va.:

Maj. E. A. N. Baker.

Capt. Geo. R. White.

Capt. Thos. C. Jones (Subsistence).

Camp Sheridan, Ala.:

1st Lt. Wm. B. Love.

Capt. J. M. Morrell (Aux. Remount).

Camp Sherman, Ohio:

1st Lt. Wm. H. Davis (Except Subsistence,
Authority expires Feb. 28, 1919).

1st Lt. Edmond B. Howard (Subsistence, Au-
thority expires Feb. 28, 1919).

Camp Stanley, Texas:

Capt. Geo. R. Kitchen.

Camp Taylor, Ky.:

Capt. Jas. G. Eversole (Subsistence).

Lt. F. E. Cavanaugh (Except subsistence).

Capt. Roy A. Baxter (Aux. Remount).

Camp McClellan, Ala.:

Maj. H. M. Mangus.

Capt. T. J. Phillips.

Camp Meade, Md.:

1st Lt. Clare S. Johnson.

Camp Merritt, N. J.:

Lt. Col. John Fawcett.

Capt. Albert Johnson.

Camp Shelby, Miss.:

Maj. Geo. H. Weller.

2nd Lt. A. H. Gerde.

Camp Travis, Texas:

Capt. Albert Lobits.

1st Lt. Earl H. Eddleman.

Camp Upton, N. Y.:

Lt. Col. A. H. Davidson.

1st Lt. Wm. S. Bouton.

2nd Lt. Leo. A. Mangan.

Camp Wadsworth, S. C.:

2nd Lt. Sidney W. Bishop.

Camp Wheeler, Ga.:

Lt. Col. Chas. J. Nelson.

1st Lt. James Burlington (Purchasing Officer only).

FORTS

Fort Adams, R. I.:

Capt. R. G. Thackery.

Fort Armstrong, Hawaii:

Capt. John S. Scally.

Fort Apache, Ariz.:

Capt. H. W. Niemeyer.

Fort Banks, Mass.:

Capt. Gustave B. Ballard.

Fort Benjamin Harrison, Ind.:

Capt. W. S. King.

Fort Bliss, Texas:

Capt. J. A. Barnes.

Fort Clark, Texas:

Capt. August Pitman.

Fort Des Moines, Iowa:

Capt. Lemuel Betty.

Fort De Russey, Hawaii:

Capt. John S. Scally.

Fort Douglas (Ariz.):

Capt. F. W. Rea.

Fort Douglas, Utah:

Capt. F. L. Fink.

Fort Dupont, Del.:

Capt. Harvey P. Winslow.

Fort Ethan Allen, Vt.:

Capt. Ledyard Cogswell.

Fort Hamilton, N. Y.:

2nd Lt. Lynn H. Thompson.

- Fort Hancock, N. J.:*
Maj. O. H. Balch.
- Fort Howard, Md.:*
1st Lt. Walter B. Swindel.
- Fort Huachuca, Ariz.:*
Capt. Bernard Sharpe.
- Fort Kamehameha, Hawaii:*
Capt. John S. Scally.
- Fort Totten, N. Y.:*
Capt. Julius Tannebaum (Construction and Repair only).
- Fort Mason, Calif.:*
Lt. Col. Geo. G. Bailey.
- Fort McIntosh, Texas:*
2nd Lt. G. F. Price.
- Fort McPherson, Ga.:*
Maj. Paul A. Larned.
- Fort Nogales, Ariz.:*
Capt. Theodore L. Fitchtel.
- Fort Preble, Maine:*
Capt. Jas. L. Glascock.
- Fort Rodman, Mass.:*
2nd Lt. Edward J. Phillips.
- Fort Russell, Wyo.:*
Capt. Wm. P. Simpson.
- Fort Ruger, Hawaii:*
Capt. John S. Scally.
- Fort Schuyler, N. Y.:*
Capt. Julius Tannebaum (Construction & Repair).
- Capt. Harry Dayton (Construction & Repair).
- Fort Shafter, Hawaii:*
Capt. Frank J. Dougherty.

Fort Sill, Okla.:

Col. Geo. D. Guyer (Equipage & Misc. Supplies).

Maj. J. T. Stockton (Fuel & Forage & Reclamation).

Artillery Training Center:

Capt. W. J. Heid.

Fort Slocum, N. Y. (Recruit Depot):

Maj. H. C. Zimmerman.

Fort Snelling, Minn.:

Capt. L. S. D. Rucker.

Fort Thomas, Ky.:

Capt. Aaron Freeman.

Fort Wood, N. Y.:

2nd Lt. R. F. Russell.

SCHOOLS AND TRAINING DETACHMENTS

Aerial Gunnery, Mt. Clemens, Mich.:

Capt. Thos. F. Cook.

U. S. Military Academy, West Point:

Col. E. J. Timberlake.

University of Florida:

2nd Lt. Raymond W. Hogan.

University of Maine:

Warren S. M. Hollaway.

University of Akron, O.:

2nd Lt. Edward B. Hurrell.

University of Texas:

2nd Lt. Howard Bland.

University of Vermont:

2nd Lt. Wm. D. Smith.

HOSPITALS

Army & Navy Hospital, Hot Springs, Ark.:

Major J. E. Ash.

U. S. A. Gen. Hospital No. 1, N. Y.:

Capt. Robt. M. Ewing.

U. S. A. Gen. Hospital No. 2, Ft. McHenry:

Capt. Wm. W. Heaton.

Capt. Wm. U. Watson.

U. S. A. Gen. Hospital No. 4, Ft. Porter, N. Y.:

Capt. John H. Baker.

Madison, N. Y.:

2nd Lt. John S. Donahue.

New Haven, Conn. (Recruiting):

Col. W. A. Mercer.

Scofield, Hawaii:

Capt. Wm. J. Murphy.

U. S. A. Gen. Hospital No. 7, Roland Park, Md.:

Capt. W. B. Bradley.

U. S. A. Gen. Hospital No. 9, Lakewood, N. J.:

1st Lt. Walter M. Waskon.

U. S. A. Gen. Hospital No. 22, Richmond, Va.:

1st Lt. Jas. J. Walsh.

Plattsburg, N. Y.:

Capt. D. E. Marcy.

Capt. E. N. Strout.

Whipple, Ariz.:

Lt. Walter S. Barnes.

FIELDS

Brooks Field, Texas:

2nd Lt. A. W. Lee.

Carlstrom Field, Fla.:

2nd Lt. H. U. Fiebelman.

Caruthers Field, Texas:

2nd Lt. John J. Davlin.

2nd Lt. Clinton O. Potts.

Kelly Field, Texas:

Capt. Louis V. DeBirney.

Park Field, Tenn.:

1st Lt. J. L. Palmer.

Post Field, Okla.:

Capt. J. A. King.

Taylor Field, Okla.:

2nd Lt. F. W. Fisher.

ARSENALS

Rock Island, Ill.:

1st Lt. Samuel J. Lewis (Conservation & Reclamation).

2nd Lt. Clifford Martin.

2. Quartermasters of all depots, camps, forts, posts, and other military establishments who have not nominated officers for appointments as Purchasing and Contracting Officers, as required by Paragraph 3 of Notice 66, dated August 7th, 1918, are directed to submit names for such appointments to the office of the Quartermaster General immediately.

By authority of the Acting Quartermaster General.

BENJ. L. JACOBSON,

Lt. Col. Q. M. Corps, Executive Officer.

400.15 A-OR

S-4030-B

WAR DEPARTMENT,

PURCHASE, STORAGE & TRAFFIC DIVISION,

OFFICE OF THE DIRECTOR OF

PURCHASE AND STORAGE,

Washington, December 2, 1918.

Purchase & Storage Notice No. 109.

Subject: List of Purchasing and Contracting Officers

1. As provided in paragraph 5 of Notice No. 66, from the Office of the Quartermaster General, dated August 7, 1918, the following officers having been nominated and appointed as Purchasing and Contracting Officers for the places and stations indicated, such appointments being with general contracting powers and for an indefinite period of time, unless otherwise stated:

(A) PROCUREMENT DIVISIONS, O. Q. M. G.

Clothing & Equipage Division:

Lt. Col. R. W. Lea.
Major H. M. Schofield.
Capt. A. J. Farnsworth.
Capt. S. W. Shaffer.
Capt. H. G. Straus.

Leather Subdivision, C. & E. Division:

Lt. Col. Geo. B. Goetz.
Capt. A. F. Cochran.
Capt. J. D. Goodpasture.
Capt. James H. Harphan.

Salvage Division:

Lt. Col. P. N. Merzig.
Capt. W. L. Lester.

General Supplies:

Major E. A. Darr.
Major H. P. Hill.
Lt. C. W. Bliss.

Machinery & Engineering Division:

Lt. Col. Earl Wheeler.
Lt. Col. C. H. Crawford.
Capt. L. D. Waldron.

Motors and Vehicles Division:

Col. E. L. George.
 Col. Fred Glover.
 Major A. H. Zacharias.
 Capt. W. R. Metz.
 Capt. C. E. Fruddan.
 Capt. W. A. Rosenfield.
 Lt. A. M. Wilmit.

Raw Materials Division:

Paint Branch:
 Capt. A. O. Van Suetendael.
 Lt. H. R. Willets.
 Oil Branch:
 Lt. Col. U. G. Lyons.
 Capt. L. E. Molineaux.

Remount Division:

Major H. E. Strawbridge.
 Capt. J. W. Appleton.
 Capt. W. S. Cameron.
 Capt. J. J. McCartney.
 Capt. A. H. Higgenson.
 Capt. C. Robbins.
 Capt. M. M. Smith.

Subsistence Division:

Forage Branch:
 Major John Roberts.
 Major H. J. Owens.

(B) GENERAL SUPPLY DEPOTS

Atlanta, Ga.:

Lt. Col. C. R. Gray.
 Major Geo. M. Alden.
 Capt. L. W. Winterberger.
 Capt. G. E. Dolge.

Baltimore, Md.:

Major A. M. Miller.

Major J. E. Schiller.

Shipping Control Committee:

Lt. Edward Schranz, Jr.

Zone Supply & Port Storage:

Lt. J. J. Winn.

Boston, Mass. (Cambridge):

Col. A. W. Yates.

Major W. K. Nash.

Capt. T. G. Turner.

Capt. H. L. Ewer (Wool).

Chicago, Ill.:

Major E. J. Zimmerman (Salvage).

Major G. H. Caswell (General Supplies).

Major Geo. F. Mayer (Clothing & Equipage).

Capt. L. Allen (Motors).

Capt. J. C. Shugert (Subsistence).

Capt. H. M. Rogers (Fuel & Forage).

Capt. E. A. Hey (Grocery).

Capt. S. Morris, Jr. (Meat).

Capt. Edward Rosing (Const. Reps. & Service).

Lt. J. A. Crandall (Vehicles & Harness).

El Paso, Texas.:

Lt. L. D. Lawson.

Jeffersonville, Ind.:

Major Marshall T. Levey.

Major Wm. J. Bass.

Capt. F. M. Houston.

Capt. L. W. Neidhardt.

Capt. C. R. Sherman.

New Orleans, La.:

Capt. P. T. Murphy.

Capt. C. A. Semler.

Newport News, Va.:

Capt. M. R. Ginn.

Lt. H. W. Bryan (Subsistence).

New York, N. Y.:

Capt. J. R. Holt.

Lt. P. M. Hooper.

Lt. Lewis D. Gross.

Director of Shipping:

Capt. W. L. MacQuillan.

Office of Supt. of Transport Service:

Lt. Col. F. F. Jackson.

Post Utilities:

Major C. W. Yeomans.

Omaha, Nebraska:

Lt. M. J. Sannebeck.

Philadelphia, Pa.:

Major A. L. Lemon.

Lt. P. W. Tucker.

Expeditionary Depot:

Capt. D. L. Coulbourn.

Shipping Control:

Lt. Col. Graham Parker.

Capt. C. A. Page.

San Antonio, Tex.:

Capt. F. M. Kerr (Clothing & Equipage).

Capt. T. Otis Baker (Subsistence).

Lt. L. W. Coyle (Fuel & Forage).

Post C. & E. Officer:

Major E. W. Scott.

San Francisco, Cal.:

Major M. L. Gerstle.

Capt. H. K. Weidenfield (Subsistence).

St. Louis, Mo.:

Major Robert Field.

Washington, D. C.:

Capt. H. A. Barnard.

2. This list replaces the list published in Office of the Quartermaster General Notice No. 179.

3. Quartermasters of all depots, camps, forts, posts, and other military establishments who have not nominated officers for appointment as Purchasing and Contracting Officers, as required by Paragraph 3 of Notice 66, dated August 7, 1918, are directed to submit names for such appointments to the Office of the Director of Purchase and Storage.

By authority of the Director of Purchase and Storage.

B. B. DOWNS,

*Major, Quartermaster Corps,
Administrative Control Branch
General Administrative Division.*



INDEX

	Page
I. There was no error in the judgment of the Court of Claims in holding that the claimant was not entitled to recover alleged damage with reference to the cured but unsmoked bacon sold in Europe-----	1
II. No tender of Army bacon for March, 1919, delivery was made by claimant as in law would amount to delivery of the same-----	9
III. Section 120, National Defense Act does not apply-----	14
IV. The Dent Act does not apply-----	15
Conclusion -----	16

CASES CITED

<i>American Smelting & Refining Co. v. United States</i> , 259 U. S. 75-----	15
<i>Grant v. United States</i> , 7 Wall. 331-----	12
<i>A. B. Small & Company v. American Sugar Refining Co.</i> , 267 U. S. 233-----	5
<i>A. B. Small & Company v. Lamborn & Company</i> , 267 U. S. 248-----	5
<i>United States v. Behan</i> , 110 U. S. 338-----	8
<i>Waples & Company v. Overaker & Company</i> , 72 Tex. 7; 13 S. W. 527-----	4

STATUTES CITED

National Defense Act, Section 120 (Act of June 3, 1916, c. 134, 39 Stat. 166, 213)-----	14
Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272)-----	15

TEXTBOOKS

2 Williston on Sales, 2d Edition, Section 547, p. 1371-----	4
71155-25-----1	(1)



In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 288

THE UNITED STATES, APPELLANT

v.

SWIFT & COMPANY

No. 289

SWIFT & COMPANY, APPELLANT

v.

THE UNITED STATES

CROSS APPEALS FROM THE COURT OF CLAIMS

REPLY BRIEF OF THE UNITED STATES

I

There was no error in the judgment of the Court of Claims in holding that the claimant was not entitled to recover alleged damage with reference to the cured but unsmoked bacon sold in Europe

On March 5, 1919 (R. 41, Finding XIX), General Kniskern, by O. F. Skiles, advised claimant by letter that no issue bacon (together with certain

other packing-house products) above the quantities noted on February contracts would be required by his office; that any issue bacon then in smoke in excess of February delivery would be accepted; that it was the intention of his office to enter into negotiations with the claimant "with a view of making settlement for such material as you now actually have on hand *which can not be utilized after completion of the February contracts.*" (Italics ours.)

He further advised, "You are instructed to use every effort to dispose of such material as you now have on hand, in order that adjustment may be quickly made."

It further appears that, as of March 5, 1919 (R. 45, Finding XXIII), the claimant had in process of cure, but unsmoked, 1,068,539 pounds of bellies, of which 417,881 pounds were in preparation by claimant and 650,658 pounds by Squire & Company for the account of claimant.

Thereafter, the claimant proceeded to dispose of the stated 1,068,539 pounds of bellies, and the manner of such disposition and the prices received therefrom are set out in detail at page 51 of the Record (Finding XXX).

The facts of such disposition and the prices received were as follows:

That 417,881 pounds of the bellies were allowed to remain in cure for from 78 to 86 days. (R. 46.)

That during the month of May, 1919, 56,900 pounds of the bellies were sold in the United States for New York delivery substantially at the price of 34 cents per pound. Likewise, claimant slightly smoked 8,325 pounds of the bellies and disposed of them to its southern trade at prices netting 31 cents per pound; 1,003,314 pounds were shipped to Europe, such shipments being made principally from April to June, 1919, with the major portion sold abroad thereafter throughout the last quarter of the year 1919, although some sales were made in January, 1920. Of the total shipments, 820,622 pounds were sold in France at a price which netted 12.30 cents per pound.

The court below (R. 83) in its opinion reaches the conclusion that it was the duty of the claimant "to have relied upon the home market and to have taken such steps that it might show that it had exhausted that market before resorting to a foreign one, and that, in the absence of such showing, it assumed the risk of procuring such results as would demonstrate that the course taken had resulted beneficially to the other party."

There is no finding of fact which shows that such efforts had been made to exhaust the home market. The finding is that sales were made in substantial quantities on the New York market in May at prices which netted about 34 cents per pound. Further, that after slight smoking, sales were made

in southern territory by the claimant at prices which netted about 31 cents per pound.

The distressing condition of European affairs, both commercial and financial, was well known as of that time. A resort to that market for the disposition of the product here involved must necessarily have been of a speculative character, in so far as the outcome of the project could be foreseen. The claimant took the risk of this speculative project and may not now charge the Government with the unfortunate results of its own adventure, or possibly misadventure. The court below in its opinion (R. 83), in regard to this particular transaction, reaches the conclusion that claimant probably acted in good faith in resorting to shipment of the unsmoked bacon. But good faith alone is not sufficient to fix a claim of damages against the Government on conditions here disclosed.

Claimant has cited 2 Williston on Sales, 2d Edition, section 547, p. 1371, to the effect that the law "is satisfied with a fair sale made in good faith according to established business methods." It is obvious that this authority is not here applicable, because this claimant followed no established business methods in departing from the domestic market and seeking a market for these products in the disorganized countries of Europe.

The case of *Waples & Company v. Overaker & Company*, 72 Tex. 7, 13 S. W. 527, decided by the

Supreme Court of Texas, is also quoted from to the effect that—

It is the duty of the seller in such a case to exercise good faith and to realize the best price he can on resale; but, if in the light of the facts before him, obtained in the exercise of due diligence, he pursues the course which prudence would indicate to a man of ordinary prudence, then the defaulting buyer ought not to be heard to say that the market on which the thing was sold was not in fact the most advantageous one.

The very language here quoted states a principle which prevents recovery by this claimant. That principle is that the seller must pursue a course which prudence would indicate to a man of ordinary prudence. It is clear under the conditions existing in May, 1919, in the domestic market and in the European markets, that the domestic market would have suggested itself to a man of ordinary prudence, claiming to be dealing on behalf of another, and that other the Government.

Claimant has referred to the cases of *A. B. Small & Company v. American Sugar Refining Company* (267 U. S. 233) and *A. B. Small & Company v. Lamborn & Company* (267 U. S. 248), both decided March 2, 1925, by this court. Examination of these cases discloses facts which make the doctrines there announced inapplicable to the case at bar.

In *Small v. American Sugar Refining Company*, all of the sugar had been delivered to the common carrier for shipment to the vendee, and the vendor subsequently repossessed itself of the sugar and made sale of the same after default by the vendee. There was no allegation of any undue delay or lack of diligence in such sale. The evidence offered as to better prices covered sales made in small quantities. There was no substantial showing of inadequate resale price.

In *Small v. Lamborn & Company*, part delivery had been made to the vendee and part delivery to the carrier to be shipped to the vendee, and a part remained to be so delivered when the vendee breached the contract. Likewise, evidence as to inadequate resale price was of the same character as above discussed. This Court held that the evidence of inadequate resale price was not of a character to affect the fairness of that resale price.

In both cases this Court said the true question was whether "the resale was fairly made in a reasonably diligent effort to obtain a good price." In these cited cases, the resales were made in the territory and on the domestic market in which the original sales were to take effect. In the case at bar, the sales made by this claimant were in foreign countries and in foreign markets, both of which were badly disorganized and disrupted in a commercial and financial sense, and the prices received were entirely inadequate as compared with the prices for the same product which had previously

been disposed of in the domestic markets of the United States where the original alleged sale was to have taken place.

It is evident that the declarations of this Court in the two cited cases have no application to the state of facts here under consideration.

General Kniskern, in the letter of March 5, 1919 (R. 41), did direct claimant to dispose of such material as it then had on hand; but no construction could be placed upon the letter of that date which would authorize claimant to make disposition in a foreign country. That General Kniskern intended no such construction to be placed thereon is evident from the contents of his letter of August 29 (R. 48), where, in express terms, unofficially, he suggests that sales be made in the United States.

In this connection, claimant has made the point that the court below was probably misled in the belief that the claimant had been advised by General Kniskern to sell this particular product, the bellies, within the United States, because the letter of August 29, 1919, is claimed to refer only to Army bacon completely cured and smoked.

Examination of this letter from General Kniskern to claimant discloses that no positive and certain construction can be placed thereon, and it might well be held that General Kniskern was advising this claimant generally as to the disposition to be made of all products prior to the submission of its claim for damages.

The contention is likewise made that these particular bellies had been shipped abroad previous to August 29, 1919.

Reference to the finding of facts relative to the disposition and shipment of this particular product (R. 52) discloses two facts of importance, namely, that while, as a matter of fact, the bellies in question had been shipped abroad previous to that date, the larger part of the sales of the bellies made abroad were subsequent to that date (R. 52); and, further, there is no finding in the record that the Government had any notice of the shipment and attempted foreign sale of the bellies in question, either at the time the letter of August 29, 1919, was written or at any previous date.

The claimant in its brief (p. 152) quotes from *United States v. Behan*, 110 U. S. 338. Examination of this quotation shows that it is not in point in this particular instance, for the reason that the Court in that part of its opinion quoted is not dealing with the subsequent disposition of the materials obtained to carry on the cancelled contract with the Government there involved, but is dealing with the contention that the claimant in that case ought to recover for its *losses and expenditures*. The Court found these were incurred in an endeavor to perform the contract, and then adds "if they were foolishly or unreasonably incurred, the Government should have proven this fact. It will not be presumed."

It is evident that this quotation and the doctrine announced has no application to the disposition of the bellies here in question, where the method of disposition was not a prudent selection, but was one necessarily involving speculative risks and uncertain results.

That the decision to ship the product abroad was not a prudent or wise decision is largely and substantially shown by the results of sales made there in comparison with sales in this country.

It is therefore respectfully submitted that this claimant is not entitled to recover damages on account of the sales made in foreign countries, because of the lack of due diligence, care, and prudence in the selection of the market upon which disposal was made of the unsmoked bacon here involved, and because its choice of a market involved a hazardous and speculative undertaking, when recent experience in domestic markets indicated substantial prices.

Its cross appeal should be dismissed.

II

No tender of Army bacon for March, 1919, delivery was made by claimant as in law would amount to delivery of the same

Claimant in its reply brief at page 59 (Point IV) contends that the alleged contract of sale between claimant and the Government for Army bacon to be delivered in March, 1919, was taken out from under the provisions of any statutory requirements as to form and substance, by virtue of performance.

In the court below this claimant vigorously contended that the letter of March 5, 1919 (R. 41), and the letter of March 7, 1919 (R. 46), passing between the Government and the claimant, did not constitute any kind of contract, and stood firmly upon an alleged contract based upon the letters of November 12, 1918 (R. 36), and December 10, 1918 (R. 39), passing between the Government and the claimant.

However, it now contends that the claimant, principally by virtue of the letter of March 7, 1919, made such a tender of a completely manufactured article as amounted to delivery.

Even a passing examination of the terms of that letter shows affirmatively that the claimant, as of the date of the receipt of the letter of March 5th, had not put itself in a position to make such a tender as amounted to delivery.

This is shown beyond controversy by the expression contained in the letter itself, which is as follows: "We offer for delivery *during March*" certain amounts of bacon then set out in detail.

This is followed by a statement of the condition of the bacon at that time:

All of the above product was in smoke, or in ears awaiting to be canned, when we received your letter of March 5th. We presume you will issue purchase orders promptly.

From its own declaration as of the time of the alleged tender it appears that some of the bacon was not as yet even completely smoked and none of it had been canned, which operation was essential to the preparation of Serial 10 bacon. (R. 43.)

It is apparent that this claimant was not then in a position to contend for the application of any doctrine involving complete manufacture of the product to be delivered.

It is true that again on March 14, 1919, the record shows (R. 47) that the claimant again wrote the General Supply Depot at Chicago with reference to this bacon, but it is apparent that the record still does not disclose that the bacon had been completely manufactured and prepared for delivery, and all reasoning is against this conclusion when it is recalled that only one week had expired since it had stated that some of this product was still in smoke and some in cans awaiting to be canned, and furthermore, that more than four million pounds of the product were involved. Furthermore, this matter is closed by reference to the letter of March 22nd from the claimant (R. 47), where even at that late date all that it can say is, "At the present time we have these amounts *practically* all packed and ready for delivery." It is clear there was no final completion of the contract at the time of the alleged tender. After March 22 the record shows no further tender, and furthermore, in reply

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to their letter of March 14 General Kniskern had told them no acceptance could be made until a price had been agreed upon.

On this state of the record, no finding can be had, or any inferential finding made, that there had been completion of manufacture. Furthermore, General Kniskern immediately wrote claimant that no bacon could be received until a price had been agreed upon and purchase orders had been prepared.

So the following situation is found, that before the bacon had been completely manufactured and before any price for the same had been agreed upon the letters of March 7 and March 14 from this claimant are claimed to constitute such a delivery as would pass title to the Government.

Nor has the question of inspection anything to do with this decision. The record discloses (R. 45) that the regular governmental inspection was to have been withdrawn March 10, 1919, and that it was continued at the request of the claimant.

In the first place, by virtue of the decision in *Grant v. United States*, 7 Wall. 331, 336, this Court has held that the question of inspection prior to the completion of the contract constitutes no acceptance. Further, it is apparent that inspection of an incomplete article can never amount to acceptance of the completely manufactured article so as to give full effect to the provision that the goods are subject to inspection.

Driven from pillar to post as to the grounds of its right to recover and of the Government's liability, the claimant once again, to use its favorite expression, "grasps at straws" and seeks application of doctrines of law which in their very terms deny recovery. The authorities cited do say that complete manufacture of the article and tender of the same has been in some cases held to constitute delivery so as to entitle claimant to sue for the contract price. But by inescapable inference, and in some cases by outright statement, these cases further establish that, in the absence of such complete manufacture and tender at the place of delivery, no such doctrine has application.

It is respectfully submitted that the title to the Army bacon for March delivery never in any form vested in the Government, and that no subsequent sale of the same was ever for the account of, or in behalf of, and by direction of any authorized governmental agent. The only evidence in the record of direction by the Government is General Kniskern's letter of August 29, 1919 (R. 48), where in terms he states he has no authority to give the claimant instructions as to disposition. Such disposition and sale as was made was made on the claimant's own initiative and in its own interests, under conditions which at law amount to without notice to the Government. This last conclusion follows, because General Kniskern in terms stated to the claimant in his letter of August 29th that he had no authority to direct the disposition of the product.

His suggestion for immediate sale was clearly one lacking authority to bind the Government.

Accordingly, it is respectfully submitted that the title to these goods never did pass to the Government; that they were sold without official instruction from the Government at a date five months subsequent to the proper time of their disposition, if there had ever been any liability on the Government in this connection. No such liability is shown in this record because of lack of a valid contract between the parties, lack of performance of any alleged contract, so as to take it from without the requirements of the law.

Section 120, National Defense Act, does not apply

Claimant advances the contention that the transactions between it and the Government with reference to this bacon fall within the provisions of the National Defense Act, section 120 (Act of June 3, 1916, c. 134, 39 Stat. 166, 213.)

In this Act the President was authorized to place an order for needed supplies with any firm, the performance of which order was made obligatory upon the firm or corporation.

This method was "in addition to the present authorized methods of purchase and procurement."

The answer to this contention is, first, that the method or procedure described in the statute was not made use of in this case, but that certain letters passed between the alleged contracting parties. Secondly, it will be noted that Section 120 in no

manner did away with the other methods of procurement and purchase, namely, by contract or attempted contract.

On the facts here disclosed, it is evident that if ever any obligation arises, it is by virtue of an attempted contract on the part of the Government and Swift & Company, and that Section 120 has no application. *American Smelting & Refining Co. v. United States*, 259 U. S. 75, 77.

IV

The Dent Act does not apply

At page 105 of its brief (Point VI), this claimant still urges that the Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272) applies. It bases its contention upon an alleged contract to take capacity from Swift & Company arrived at in a conference on November 9, 1918.

This contention is foreclosed by one outstanding fact. The very first transaction between Swift & Company and the Government subsequent to that meeting shows these conditions: That Swift & Company made offers of 21,500,000 pounds of bacon and the Government did not accept this offer as to that quantity, but that General Kniskern by his letter of December 10, 1918, now contended to have been a valid acceptance of that offer, requested delivery of only 17,500,000 pounds.

Swift & Company made no objection on the ground that its capacity was not being taken, and

evidently the Quartermaster Depot at Chicago, which had held the conference of November 9, did not consider itself bound to take Swift's capacity.

This one fact negatives any conclusion that either one of the parties thought they had a contract for capacity. Therefore, the whole argument as to the application of the Dent Act must fail.

V

CONCLUSION

It is respectfully submitted that, neither on account of its cross appeal, nor because of any application of either Section 120 of the National Defense Act, or of the Dent Act, nor by reason of any legal tender and delivery of any bacon for March, 1919, delivery, is this claimant entitled to recover judgment against the Government.

Accordingly, the judgment herein heretofore entered by the Court of Claims should be set aside and the petition dismissed.

WILLIAM D. MITCHELL,

Solicitor General.

WILLIAM J. DONOVAN,

Assistant to the Attorney General.

ABRAM F. MYERS,

RUSH H. WILLIAMSON,

Special Assistants to the Attorney General.

NOVEMBER, 1925.



SUPREME COURT OF THE UNITED STATES.

Nos. 288 and 289.—OCTOBER TERM, 1925.

288	The United States, Appellant, vs. Swift & Company.	}	Appeal from the Court of Claims.
289	Swift & Company, Appellant, vs. The United States.		

[March 1, 1926.]

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a suit to recover damages for the loss caused to Swift & Company by the refusal of the United States to accept a quantity of finished and unfinished Army bacon ordered by competent authority for delivery in March, 1919. The only ground for not accepting it was that the need had been removed by the unexpected rapidity of demobilization. The claim was first presented to the War Department under the Act of March 2, 1919, 40 Stat. 1272, known as the Dent Act. It was denied by the Board of Contract Adjustment of the War Department, on the ground that the agreement under which the bacon was produced was not concluded until after November 12, 1918, the Dent Act applying only to agreements entered into prior to that date. The Secretary of War affirmed this decision. The petition in the Court of Claims alleged that the liability of the Government was lawfully established by a written contract properly signed and executed, binding the United States.

The Court of Claims found that the contract was entered into in due and regular form, and could be enforced under the general jurisdiction of the Court of Claims, and that even if there were defects in the contract, as the contract had been fully performed in accord with the terms of the contract as subsequently modified by the parties, the alleged defects were immaterial. It accordingly gave judgment for \$1,077,386.30 being the difference

between the contract price for the bacon ready for delivery in accordance with the contract and the proceeds of its sale. In addition to this amount, Swift & Company sought damages in the amount of \$212,216.69 for more than one million pounds of salted bellies which had been cured but had not been smoked and made into bacon, and which were on hand at the time the contract was cancelled. A large part of these were sold in France at a very large reduction. The Court of Claims held that by attempting to sell this material abroad, Swift & Company had taken a speculative course and could not hold the Government for the difference between the contract price and the proceeds of sale. Swift & Company filed a cross appeal on this issue, and that is before us.

The Government in the Court of Claims set up a counter claim against Swift & Company for \$1,571,882, made up of alleged improper and illegal charges presented by the plaintiff to the defendant on account of army bacon delivered from September, 1918 to February, 1919, which were paid by the Government by mistake to Swift & Company in the settlement of bills and accounts so presented. The Court of Claims found that it was not shown to the satisfaction of the court that any improper or illegal charges had been made or paid by mistake, or that any misrepresentation or concealment was practiced by Swift & Company, to the detriment of the Government in the settlement. The Government appealed from this rejection of the counter claim, but does not press its appeal.

The correspondence upon which Swift & Company asserts the existence of a valid contract in writing before the parties is contained in the sixteenth finding of the Court of Claims:

"XVI.

"On November 9, 1918, a conference was held on the call of General Kniskern at which he and Major Skiles, for the Government, were present and representatives of the seven large packers, including Swift & Co., for the purpose of providing allotments of bacon and other meat products for the months of January, February, and March, 1919. The quantity of bacon asked for for the three months stated was 60,000,000 pounds, 30,000,000 pounds each of Serials 8 and 10.

"On November 12, 1918, Swift & Co. sent to the general depot of the Quartermaster Corps at Chicago the following communication:

*"Swift & Company,
Union Stock Yards,
Chicago, November 12, 1918.*

*"War Department,
General Depot of the Quartermaster Corps,
1819 West 39th Street, Chicago, Illinois.*

"Gentlemen: (Attention Maj. Skiles).

*"Referring meeting in your office Saturday, November 9th,
please be advised we offer for delivery during January, February,
and March, 1919:*

*17,500,000 lbs. serial 10 bacon and
4,000,000 lbs. serial 8 bacon.*

21,500,000 lbs.

"We offer for delivery each month as shown under:

	Serial # 10	Serial # 8
January,	6,000,000	1,400,000
February,	5,500,000	1,200,000
March,	6,000,000	1,400,000
Total,	17,500,000	4,000,000

"You will note we are offering a larger proportion of serial #10 than of serial #8 bacon. This because we have gone to great expense in equipping canning rooms at Chicago, Kansas City, and Boston on the understanding that you very much preferred serial #10 bacon to serial #8. The amount serial 10 given above is the minimum amount required to enable us to operate our canning rooms at fair capacity. If necessary we are willing to have our offers Serial 8 bacon increased and serial 10 decreased proportionately to the extent you find necessary bearing in mind that we will appreciate as liberal a proportion of serial #10 bacon as possible.

"Will you kindly advise if we shall figure to put down above amounts for delivery as shown. After receipt of such advice we will furnish you with statement of amounts we will put in cure at each plant.

*"Yours respectfully,
"Swift & Company,
"Per GES, Jr.*

"Prov. Dept. JH-JL.

"United States Food Administration License No. G-09753.

"On November 26, 1918, the following communication was sent to the Chicago office of the Food Administration for the attention of Major Roy:

United States vs. Swift & Co.

"(War Department, office of the Quartermaster General, Packing House Products Branch, Subsistence Division, 1819 West 39th Street, Chicago, Ill.)

"Subsistence.

"431 P & S-PC.

"November 26, 1918.

"From: Officer in charge, Packing House Products Branch, Subsistence Division, office Director of Purchase and Storage.

"To: United States Food Administration 757 Conway Bldg., Chicago, Ill. Attention Major E. L. Roy.

"Subject: Allotments—Bacon and canned meats.

"1. In connection with the requirements of this office—canned meats and bacon—for the months of January, February, and March, 1919, you are requested, please, to make allotments to the various packers of the items in the quantities and for delivery as is indicated below:

"Swift & Company, serial 10 bacon, January, 6,000,000 lbs.

"Swift & Company, serial 10 bacon, February, 5,500,000 lbs.

"Swift & Company, serial 10 bacon, March, 6,000,000 lbs.

(There follows names of 17 other packers followed by stated amounts of different products for each of the three months.)

"2. It is requested that packers be informed at the earliest practical date allotments made to them, in order, (*sic*) that they can make necessary arrangements for the procurement of tins, boxes, and other equipment, as well as to know the quantities of green product it will be necessary for them to put in cure during December to apply on later deliveries.

"3. Please send copy of the official allotments to this office for our records.

"By authority of the Director of Purchase and Storage:

"A. D. Kniskern,

"Brigadier General, Q. M. Corps, in Charge.

"By O. W. Menge,

"2nd Lieut., Q. M. Corps.

"OWM:JDW.

"On December 3, 1918, the Food Administration, by Major Roy, with the approval of the chief of the Meat Division, whose assistant he was, issued the following:

"Dec. 3.

"D. C. P. #8. 2187.

"From: U. S. Food Administration, Meat Division, Swift & Company.

"To: U. S. Yards, Chicago, Ill.

"Subject:

"1. On requisition of the Packing House Products Branch, Subsistence Division, office of Quartermaster General, 1819 W.

39th Street, Chicago, Ill., you have been allotted for delivery during the month of—

Product	Quantity	Price
"January, 1919, bacon serial #10;	6,000,000 lbs.	To be determined
"February, 1919, bacon serial #10;	5,500,000 lbs.	later
"March, 1919, bacon serial #10;	6,000,000 lbs.	

"2. The above to be in accordance with Q. M. C. Form 120 and amendments thereto.

"3. For any further information regarding this allotment apply to the Packing House Products Branch, Subsistence Division, office of the Quartermaster General, 1819 W. 39th St., Chicago, Ill.

"United States Food Administration,

"Meat Division,

"By E. L. Roy.

"Major E. L. Roy, Quartermaster Corps, National Army, then a captain, was by orders of the Chief of Staff, dated July 22, 1918, directed to proceed to Chicago and report to the depot quartermaster for assignment to temporary duty with the Food Administration. He became assistant to the chief of the Meat Division of the Food Administration in charge of the Chicago office of that division and remained with the Food Administration in that capacity until his resignation on December 10, 1918, following his discharge from the Army.

"Two copies of this notice were sent to Swift & Co. on one of which was stamped the words 'Accepted,' followed by this instruction: 'To be signed and returned to Meat Division, 11 W. Washington St., Chicago.'

"Swift & Co. indicated its acceptance by writing below the word 'Accepted' the following: 'Swift & Company, By G. E. S. Jr., 12/11/18', and returned this copy to the Food Administration. The price was left for later determination because of the possible fluctuation in the basic price, that is the price of hogs.

"A copy of this notice was sent to the packing-house products branch of the subsistence division, office of Director of Purchase and Storage, at Chicago, and on December 10, 1918, the following communication was sent to Swift & Co.:

"(War Department, office of the Quartermaster General, Packing House Products Branch, Subsistence Division, 1819 West 39th Street, Chicago, Ill.)

"December 10, 1918.

"Address reply to Depot Quartermaster. Marked for attention Div. 1-1-b, and refer to File No. 431.5 P & S—PC.

"From: Officer in charge Packing House Products Br., Subsistence Div., office Director of Purchase and Storage.

"To: Swift & Co., Union Stock Yards, Chicago, Ill.

"Subject: Bacon Serial 10, January, February, and March.

"1. In connection with the offers you made to this office on bacon, serial 10, for delivery during the months of January, Feb-

United States vs. Swift & Co.

ruary and March, you will please find indicated below the schedules of deliveries this office requests you to make:

January,	6,000,000 lbs.
February,	5,500,000 lbs.
March,	6,000,000 lbs.

"2. In order that proper arrangements can be made and all concerned informed accordingly, you are further requested to advise this office by return mail where you contemplate putting up these allotments.

"By authority of the Director of Purchase and Storage.

"A. D. Kniskern,

"Brigadier General, Q. M. Corps,
Officer in Charge.

"By O. W. Menge,
2nd Lieut., Q. M. Corps.

"OWM:MJB.

"Serial No. 10 bacon was prepared according to Army specification which was packed in cans, the cans being then packed in boxes. Serial No. 8 differed in that it was packed in boxes but not canned."

Upon receiving these orders, Swift & Company directed its buyers to buy hogs. From that time on purchases were conducted daily so that suitable bellies were prepared for January and February deliveries, and on January 13, 1919, the first bellies were put in cure for March, 1919, delivery.

The objections by the Government to the documents submitted on behalf of Swift & Company as written evidence of a contract, are, first, that Government officers conducting the correspondence had no authority to make it; second, that the documents do not contain the necessary terms to constitute a contract, in that they do not show the place for the performance of the contract, and do not fix the price of the bacon to be delivered; third, they do not show a real agreement between the parties, but were merely preliminary negotiations and were never merged in a written contract; and, fourth, that they do not comply with Revised Statutes, sec. 3744, in the form of contract required in such cases.

First. The officers whose names are attached to the papers on behalf of the Government are Brigadier General A. D. Kniskern, Brigadier General, Quartermaster Corps, and Major E. L. Roy, Quartermaster Corps, assigned to temporary duty with the Food Administration.

The finding of the Court of Claims in respect to General Kniskern's authority is as follows:

"The furnishing of adequate meat supplies for the Army was within the authority and duty of the Acting Quartermaster General and afterwards within his authority and duty as Director of Purchase and Storage. General Kniskern, as depot quartermaster at Chicago, was the authorized representative of the Acting Quartermaster General in the purchase of meat supplies and, while subject to any specific instructions which the Acting Quartermaster General might see fit to give him, his duty was to supply the needs, and specific authority as to each purchase was not required. There was in the office of the Quartermaster General a subsistence division, but the chief duty it exercised in the matter of the purchase of meats was to supply General Kniskern with such information as might be available as to future needs, leaving it to him to supply them. The authority of General Kniskern in connection with the establishing in Chicago of a packing house products branch of the subsistence division of the Quartermaster General's Office and in connection with his later appointment as zone supply officer appears in Findings V and VI.

"V.

"On July 3, 1918, by Office Order No. 419, Quartermaster General's Office, there was established in Chicago a packing-house products branch of the subsistence division of the Quartermaster General's Office to be located in the general supply depot of the Quartermaster Corps at Chicago, to be under the immediate direction and control of the depot quartermaster, and to be responsible for all matters pertaining to the procurement, production, and inspection of packing-house products, subject to the control of the Quartermaster General.

"The interpretation of this order by the then Acting Quartermaster General was, 'that whereas the purchasing of supplies was concentrated in Washington, that Chicago being the food market, we delegated to General Kniskern the purchase of meat products and articles of that kind.'

"VI.

"On October 28, 1918, by Purchase and Storage Notice No. 21, issued by Brig. Gen. R. E. Wood, as Director of Purchase and Storage, supply zones were created and by said order the Director of Purchase and Storage appointed 'as his representative in each general procurement zone the present depot quartermaster to act and be known as the zone supply officer', who was 'charged with authority over and responsibility for supply activities within the zone under his jurisdiction.'

"This form of organization in effect transferred the field organization of the Quartermaster Corps to the office of the Director of Purchase and Storage. The procurement divisions which had theretofore existed in the Quartermaster Corps were transferred

to the supply zones created in the purchase and storage organization, these zones being practically the same as those formerly existing in the Quartermaster Corps, over each of which the proper depot quartermaster exercised jurisdiction, and the depot quartermasters of the Quartermaster Corps became zone supply officers and representatives, as such, of the Director of Purchase and Storage.

"Existing orders and regulations of the several supply corps with respect to supply activities transferred to the Director of Purchase and Storage were continued in effect, 'providing that the zone supply officers constituted by the notice shall have final authority in their respective zones over all matters referred to in existing orders and regulations.' "

The Food Administration under the President early in 1918 found that the demand for food commodities was greater than their supply, and it was necessary to suspend the law of supply and demand in respect to their prices, and that large purchases of certain commodities should be made by allocations at fair prices. A Food Purchase Board was formally organized by the President, which, on July 16, 1918, required that canned meats and bacon should be placed on an allotment basis. General Kniskern, as depot quartermaster at Chicago, was notified by the Quartermaster General that thereafter tin bacon and smoked bacon would be allocated by the Food Administration and he was requested to cancel orders which had been placed with the packers and ask allotments of the same from the Food Administration. He accordingly in August 1918 cancelled the orders for the next four months, but wrote the Food Administration requesting that they confirm the allotments made in accordance with his orders. Thereupon Major Roy of the Quartermaster's Department, in the name of the Food Administration, made the allotments. This arrangement continued until the Food Administration gave up its activities, after the Armistice.

On December 16, 1918, General Kniskern was instructed by telegraph as follows:

"December 16, 1918.

"Effective with January requirements, the Army will purchase packing-house products independently of Food Administration.

This office is notifying Food Administration accordingly. You are authorized to proceed on this basis. Please wire acknowledgment.

"Wood, Subsistence, Baker."

Thereafter prices for January and February deliveries were determined as they had been during the early months of 1918

before that function came to be exercised by the Food Administration. The course of procedure with reference to giving the orders for bacon and the fixing of the price therefor is shown in the following Finding:

"IX.

"In supplying the needs of the Army for bacon and other packing house products during the early stages of the war, the regular method of advertising for and receiving bids and letting contracts to lowest bidders, if otherwise satisfactory, was adhered to, but later on, in 1917 and during 1918, the needs had so grown and were so rapidly approaching the capacity of the packing plants that this method became impracticable, and the necessity for a constant and ever-increasing flow of supplies of this character made necessary the resort to other purchase and procurement methods.

"The office of the depot quartermaster, afterward the zone supply officer, at Chicago was informed from time to time by the proper authorities at Washington as to the number of men which would be in the service within stated times, and the duty devolved on the depot quartermaster of procuring supplies of the kind in question sufficient for the indicated number of men without the issuance of specific authorization to him in each instance to purchase or specific instructions as to quantities to be purchased. And because of the time required to cure, smoke and can Army bacon, it was necessary to anticipate needs therefor.

"The plan was adopted by the depot quartermaster at Chicago of calling into conference with him or his authorized assistant, from time to time, representatives of this plaintiff and the six other large packing houses, at which conferences the packers' representatives were informed as to the needs of the Government for a stated period, usually three months, sufficiently in the future to give time for manufacture, and asked to indicate what portion of the stated needs each would furnish. Upon receipt of the statements from the packers as to what quantities they would furnish, which were submitted in writing and usually within a few days after the conference, the depot quartermaster made an allotment to each packer and notified each as to the quantities it would be expected to furnish during each month of the period involved."

It is quite evident from the findings that in the organization and reorganization of the many agencies needed to furnish the supplies of food in Chicago, there were apparent conflicts of jurisdiction and there were orders issued having on their face general application which in fact by the course of business were limited, and all these orders from the War Department and from the Quartermaster's Department were before the Court of Claims for

its consideration. In such a situation the finding of the Court of Claims that General Kniskern was the representative of the Quartermaster's Department in making these contracts for bacon is either a question of fact or a mixed question of law and fact, and is conclusive on this Court. *United States v. Omaha Tribe of Indians*, 253 U. S. 275, 281; *Ross v. Day*, 232 U. S. 110, 116, 117, and cases cited. There is nothing whatever in the other findings which is inconsistent with this. At the time this order was given and accepted by Swift & Company in November, 1918, the Food Administration, by direction of the President, had the authority and duty to act upon the needs of the Quartermaster General's Department for bacon and other food supplies and to approve those orders and allot them to the packing companies who were to deliver the supplies. When, therefore, the accepted orders had been signed both by General Kniskern and by Major Roy for the Food Administration, they were certainly authorized in writing on behalf of the Government.

General Kniskern's authority to act in these purchases is questioned on the ground that a Captain Shugert was the only officer authorized to make such contracts. The objection can not be sustained. On September 17, 1918, Capt. Jay C. Shugert, Quartermaster Corps, was, by authority of the Acting Quartermaster General, designated as purchasing and contracting officer for the packing house products and produce division of the office of the depot quartermaster at Chicago. This order to Shugert did not vest him with any authority to make contracts for the packing products branch of the subsistence division of the Quartermaster General's office. Before this latter branch was established, there was a packing house products and produce division of the depot quartermaster's office at Chicago to which Shugert was attached. These two offices were distinct. The former was a unit of the Quartermaster General's office located at Chicago under the immediate direction and control of the depot quartermaster, with general authority to purchase packing house products for the whole army of the United States wherever situated, as shown by the findings. The latter was a unit in the depot quartermaster's office at Chicago, and by an order of January 9, 1919, its functions were transferred to a newly organized office of Director of Purchase and Storage, and Captain Shugert

was transferred with it and thereafter signed the so-called formal contracts of January and February. More than this, even if Captain Shugert had been a purchasing and contracting officer with authority to sign this main contract of November, 1918, it would not have deprived General Kniskern of such power when his authority had been recognized and exercised in the purchase of many millions of pounds of bacon for the Government for many months.

Second. The next objection is that the alleged contract is not complete in its terms, first in that the offers made by Swift & Company included No. 8 bacon, while the order of the Food Administration and of General Kniskern included nothing but No. 10 bacon. We find no weight in this suggestion. The offer was made by Swift & Company, and it was only accepted by the allotment of the Food Administration to the extent of No. 10 bacon and that allotment was accepted in writing by Swift & Company, which, of course, eliminated bacon No. 8 from the contract.

Then it is said that in the letter of December 10th an inquiry was made by General Kniskern for information as to where the allotments were to be put up. This was not a term of the contract. It was evidently left to the discretion of Swift & Company to distribute the allotments as might be convenient to it, and the inquiry was only for information as to the various plants of Swift & Company at which inspections and deliveries were to be made.

Then it is said that there was no complete contract because the price was not fixed. Upon this point Finding No. 10 of the Court of Claims is important. It is as follows:

"Since there were many elements entering into cost of production as to which there were frequent fluctuations, it was not practicable to undertake to determine prices so far in advance, and accordingly, instead of fixing prices at the time the proposals were submitted, or notices of allotments issued, it was agreed that prices would be determined at or near the first of each month for the product to be furnished during that month. This was at a time when of necessity the preparation of the product, in this instance bacon, was well under way, approaching completion as to a large part thereof and when the cost of the green bellies, the basic element of final cost, and other fluctuating elements of cost were ascertainable.

"At about this time the usual form of circular proposals were sent to the packers, not for use in submitting bids as under the peacetime competitive system, but as a convenient method for

formal submission by the packers of their proposals as to price for the product which they had theretofore been directed to furnish during the month in question and which already, by direction of the depot quartermaster, was in process of preparation.

"Upon submission of these proposals as to price, if the same were satisfactory to the depot quartermaster or, otherwise, upon adjustment to a satisfactory basis, purchase orders were issued, which furnished the basis of payment, although the purchase orders frequently were not issued until a part and sometimes all of the product covered thereby had been delivered."

It was evidently impossible to make a contract fixing the price of the bacon in advance of the partial performance of it, and the price was therefore left to subsequent adjustment. The Food Administration, by its regulations had already determined that the profit of the seller should not exceed 9 per cent. of the investment, or 2½ per cent. of the gross sales. Under ordinary conditions, a valid agreement can be made for purchase and sale without the fixing of a specific price. In such a case a reasonable price is presumed to have been intended. In the case of *United States v. Willins*, 6 Wheat. 135, it was held under a proviso of the contract, which left the price to be adjusted by the Government and the contractor, that it was to be the joint act of both parties and not the exclusive act of either, that if they could not agree, then a reasonable compensation was to be allowed, that that reasonable compensation was to be proved by competent evidence and settled by a jury and that the contractor at such a trial was at liberty to show that the sum allowed him by the Secretary of War was not a reasonable compensation. In *United States v. Berdan Fire Arms Company*, 156 U. S. 552, 569, a suit in the Court of Claims, it was objected that there was no price agreed upon and that the officers of the Government were not authorized to agree upon a price. It was held that this was not material. The question was whether there was a contract for the use of the patent in that case, and not whether all the conditions of the use were provided for in such contract, that this was the ordinary rule in respect to the purchase of property or labor. 1 Williston, *Contracts*, sec. 41. We find, therefore, that by the writings and documents, all the necessary details making a valid contract were set forth in writing.

Third. Were they more than mere preliminary data upon which a subsequent formal contract was to be framed and signed?

Taking the writings together, it is quite evident that as between individuals such writings would constitute a single contract for the delivery of 17,000,000 pounds of No. 10 bacon in monthly installments. As the Court of Claims points out: "From the inception of the contract here involved bacon for January, February, and March deliveries was the matter to which the parties addressed themselves. At the Conference of November 9, the total needs for the three months were made known. The plaintiff's proposal, the Food Administration's allotment, in so far as that is material, and General Kniskern's award all covered the three months. Any separation of the month of March and its treatment as a matter of independent negotiation is, therefore, unauthorized."

The fact that in January and February there were separate formal contracts of purchase of the bacon deliveries for those months signed by Captain Shugert and Swift & Company does not change our view that the original contract was made in November for the three months. These latter contracts were not made until much of the bacon had been delivered and the remainder was nearly ready for delivery and after the price could be determined from the actual cost of purchase of the hogs and the preparation of the bacon. The real function of these so-called formal contracts was to fix the price for the monthly settlements which had been postponed in accordance with the provision of the original contract until it could be fairly determined from the actual cost.

Fourth. We reach the question whether the contract was evidenced in writing as required by the statutes of the United States? Rev. Stats., sec. 3744, provides that "it shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof." This has been qualified by a provision of a War Appropriation Act of March 4, 1915, 38 Stat. 1062, 1078, c. 143, reading as follows:

"That hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Quartermaster General, or by officers of the Quartermaster Corps authorized to make them, and are in excess of \$500 in

amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Quartermaster General."

It is first contended on behalf of the Government that under section 3744, Revised Statutes, the contract must be in one instrument and signed by both parties at the end thereof—that that is the effect of the words "to be signed at the end thereof." This section has been before this Court a number of times, and it has never been clearly declared by this Court to require the contract to be reduced to one instrument. In the case of *South Boston Iron Company v. United States*, 118 U. S. 37, the Court of Claims had held that the words "with their names at the end thereof" required that the signatures should be appended to one instrument, but it was not necessary to the decision of the case. On review in this Court, however, the papers relied on were held to be nothing more than preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law, which was never done. It was said that the whole matter was abandoned by the Department after the memoranda had been made and that the Iron Company had never performed any of the work which was referred to and had never been called upon to do so.

The section has been under consideration before this Court also in *Clark v. United States*, 95 U. S. 539; *St. Louis Hay & Grain Company v. United States*, 191 U. S. 159; *United States v. Andrews & Company*, 207 U. S. 228; *United States v. New York & Porto Rico Steamship Company*, 239 U. S. 88, 92; *Erie Coal & Coke Corporation v. United States*, 266 U. S. 518. In no one of these has it been expressly decided that the requirements of section 3744 may not be met by an exchange of correspondence properly signed. But whether the contention by the Government be true or not as to section 3744, the change in the Appropriation Act of 1915, in which the words "signed by the parties at the end thereof" are omitted, clearly make unnecessary the evidencing of such contracts with the Quartermaster's Department by reduction to writing and signatures in one instrument. This was a contract made by the Quartermaster's Department and comes exactly within the amendment of 1915, and we see no reason why it does not constitute a binding contract upon the Government under the general jurisdiction of the Court of Claims.

Some suggestion is made that the signature of General Kniskern to the letter of December 10 was by another. The signature was "By authority of the Director of Purchase and Storage,

A. D. Kniskern,
Brigadier General, Q. M. Corps.,
Officer in Charge,
By O. W. Menge,
2d Lieut., Q. M. Corps."

It is evident from subsequent correspondence that General Kniskern recognized this as his signature and as a binding contract. There seems no doubt about the authority of Lieut. Menge to attach his signature or that it was the regular practice in the office. In a similar case the Court of Claims, *Union Twist Drill Company v. United States*, 59 Ct. Cls. 909, held that the affixing of the signature of a contracting officer by another duly authorized created no infirmity in the execution of the contract. A similar conclusion was reached by Attorney General Gregory, 31 A. G. 349, and by Attorney General Wirt, 1 A. G. 670. The conclusion we have come to in respect to the regularity and legality of the contract under the Act of 1915 makes it unnecessary for us to consider the other ground upon which the Court of Claims sustained this recovery, to-wit, full performance.

This brings us to the question of damages. The Government contends that the Court of Claims did not adopt the proper rule in respect to damages. By the letter of January 24, General Kniskern, Zone Supply Officer, notified Swift & Company that the only bacon the Government would take during the month of March, 1919, would be such bacon as was then in process of cure over and above the quantity necessary to take care of the February awards and which had been passed by the inspectors. Swift & Company received this on January 27th, and at once stopped the putting of bacon in cure, but proceeded with the curing, smoking and canning of bacon already in cure. March 5, 1919, General Kniskern notified Swift & Company that it would be necessary to discontinue production on all commodities which were not intended to apply against the February contract. Should Swift & Company have any issue bacon which was now in smoke and which was in excess of the amount required, for the February delivery, it would be accepted. Swift & Company received this notice on March 6th, and completed the smoking and canning of bacon which was al-

ready in smoke. When the notice of March 5th was received by Swift & Company, it had already in smoke for March delivery, 4,197,672 pounds. This bacon was put up under government inspection. When the order was received, there also remained in process of cure, not needed for February deliveries, and intended for March delivery, 1,068,538 pounds of bellies. These had been prepared under government inspection. On March 22, Swift & Company notified General Kniskern that at that time it had the bacon practically all packed and ready for delivery. It said, "We are very short of storage room at each of these plants and will appreciate your giving us purchase order and shipping instructions in the very near future." April 24, General Kniskern wrote Swift & Company that his office was taking preliminary steps toward an adjustment for materials on hand to be applied against the March deliveries, which had been cancelled, and requested that a representative of Swift & Company should be present at a conference to be held at his office on April 29, 1919, "in order that you may be fully informed as to what methods should be followed by your firm in submitting your claim." On April 29, he wrote to Swift & Company, enclosing papers "necessary to prepare in order to file a claim for any amount you may consider due from the various packing house commodities allotted you for delivery during March, 1919, and on which you will suffer a loss by reason of cancellation of those orders." And in a note of August 29, 1919, General Kniskern, Zone Supply Officer, wrote as follows to Swift & Company:

"1. Regarding your claim for the value of bacon prepared by you under allotment given by this office of November 9, 1918, and in view of the fact that this claim is still awaiting action of the Board of Contracts Adjustments in Washington, I desire to state the following:

" . . . it will be impossible for this office to give you positive and definite instructions as to the disposal of any of this product which may at this time be in your possession. It is, however, realized by this office that the product in question is of a perishable nature. Further, it is an important food product. In view of these two facts, it is believed that these products should be disposed of at the earliest possible moment. It will not be possible for the Government to dispose of them until the negotiations are completed and the actual ownership determined by the Government, taking them at the agreed price or turning them over to you on a basis similar to the salvage basis of unfinished material.

"3. In the judgment of this office, if you are able to dispose of this product by a sale within the limits of the United States, it would be a perfectly proper procedure, bearing in mind, of course, that having made such sale it will be necessary for you, when the later negotiations are in progress, to be able to convince a negotiating officer that the price you may have received for such part of this product as has been sold was justified by the conditions.

"4. In order that you may have some basis on which to proceed, in case you decide to attempt a sale of these products, you are informed that this office, under authority from Washington, is now selling, through the parcel post and to individuals, bacon, serial 10, at \$4.15 per can, or about 34 7/12 cents per pound.

"5. Any sales that you may make at the price which is now being charged through the parcels post and to individuals would, in the judgment of this office, be entirely in the interests of the Government."

Thereupon Swift & Company began selling the number 10 bacon it had prepared for March deliveries. It directed its branch houses and agents to sell this at \$4.02 a can at wholesale, a price designed to permit the retailer to sell at the Government's price and realize a profit for the handling of approximately one cent per pound. It sent out instructions to its representatives that the Government was selling at \$4.15 a can and added that it was desirable, therefore, that no dealer should sell for less than that. Subsequently, and from time to time, the Government reduced its price on army bacon, and the plaintiff followed the Government's price in its sales except that in a few localities it was able to procure a better price by reason of its ability to make prompt delivery which the Government could not do. The lowest price realized was \$2.65 per can, or 22 1/12 cents per pound, which was at or near the end of the period covered by these sales. The sale of the bulk of this product, approximately 98 1/2 per cent. thereof, was completed in January, 1920, although there were sales of about 700 cases in February and a few small sales thereafter, until October, 1920, during which month the last was sold. For this bacon sold at varying prices the plaintiff received \$1,062,847.54, and its expenses of sale were \$160,982.23.

The Court of Claims found that a fair contract price for the bacon on the basis upon which prices had theretofore been fixed, and the basis upon which it was contemplated by the parties that the price for this bacon would be fixed, was \$1,640,146.18; that the cost of the bacon put up by Squire & Company, a subsidiary of

Swift & Company, for the account of Swift & Company, was \$430,410.48, and the fair contract price therefor as between the plaintiff and the United States on the basis above stated as within the contemplation of the parties was \$432,573.34; that the reasonable profit, if it had been permitted to complete and deliver this would have been \$5,021.90, and that the reasonable additional profit accruing to Swift & Company if it had been permitted to manufacture and deliver serial number 10 bacon up to 6,000,000 pounds for March delivery would have been \$8,818.30, leaving a balance, after deducting the net proceeds of sale, and certain other small items to be added, of \$1,077,386.30.

We think the necessary effect of the Court of Claims findings is that Swift & Company was diligent in disposing of this bacon at the best prices it was possible to secure. There was a very large amount of this particular bacon on the market, and the finding was that it was not particularly salable because specially prepared under army orders to avoid spoiling; that it was not commercial bacon like number 8; that it required more time for preparation and was not adapted to popular consumption because of its more salty flavor.

The Government complains that this army bacon might have been sold at an earlier time during the summer when pork was at a higher figure, and would have brought more money, but there is nothing in the findings to make a basis for this claim. The uncertainties as to the best method of disposition of such surplus supplies not needed by reason of demobilization justified care and deliberation. Swift & Company seemed to be properly anxious not to embarrass the Government by throwing what it had on the market. The large amount of bacon of this peculiar kind which had to be disposed of made its sale a matter of considerable delay. Swift & Company were evidently anxious to conform as nearly as possible to the desires of the Government, and did so. The bacon of this kind had no market price and had to be worked off slowly. Under these conditions, there was no standard by which the usual rule of damages, namely the difference between the contract price and the market price, could be the measure of Swift & Company's loss through the failure of the Government to receive the bacon. This was a case where the only standard could be the contract price and the amount realized at actual sale by diligent effort. The rule is that where there is no general market or the merchan-

dise is of a peculiar character and not staple, it is necessary that some other criterion be taken than the difference between the agreed price and the general market value. *Fisher Hydraulic Stone & Machinery Company v. Warner*, 233 Fed. 527; *Kinkead v. Lynch*, 132 Fed. 692; *Leyner Engineering Works v. Mohawk Consolidated Leasing Company*, 193 Fed. 745; *Manhattan City, etc. Ry. Co. v. General Electric Company*, 226 Fed. 173; *Frederick v. American Sugar Refining Company*, 281 Fed. 305; *Barry v. Cavanaugh*, 127 Mass. 394; *Dunkirk Colliery Co. v. Lever (C. A.)*, 9 Ch. Div. 20, 25.

For these reasons, the measure of damages adopted by the Court of Claims for the bacon which had been prepared under the contract and which the Government did not take, was justified.

We come now to the question of the cross appeal of Swift & Company with reference to the bellies which were sent abroad for sale in April, after the Government had indicated its desire to cancel the orders for March. These bellies had not been made into bacon. Of these 65,225 pounds was sold in the United States at an average price of 33 1/16 cents per pound. All of the remainder of them were shipped abroad. Those that went to Belgium were sold at 31 cents; to Norway at 31 cents; to Germany at 40 cents, and to France at 16.56 cents. Swift & Company had theretofore in ordinary course of business, exported similar products in large quantities, and believed that at this time it would find a good market because of the widely reported shortage of food products in Europe. With these exportations Swift & Company had shipped largely of other products on its own account on which it sustained heavy losses. The Court of Claims in its opinion states that it is quite clear that in seeking a foreign market for this product, plaintiff was acting in perfect good faith, and in accordance with its best judgment, based on former experiences in exporting and information then at hand as to markets to be anticipated abroad. But the court said that it did not think it could relieve itself from the consequences of its error in seeking a foreign market. "It is true that it does not appear that it could have made other sales on the basis of those made in New York; on the contrary, it is rather to be implied that other purchasers were not then available and that the one found would not buy further, but it seems to us that it was the duty of the plaintiff to have relied upon the home market

and to have taken such steps that it might show that it had exhausted that market before resort to a foreign one, and that in the absence of such a showing, it assumed the risk of procuring such results as would demonstrate that the course taken had resulted beneficially to the other party."

We do not agree with this conclusion. We do not think seeking a market in France was so different from attempting a sale in the United States as to indicate a disposition to speculate at the expense of the Government. In view of the complete good faith manifested by Swift & Company in this whole transaction, and the willingness on its part to give up its claim for larger damages for failure of the Government to take the full March delivery, and in the absence of proof that the bellies might have been disposed of anywhere else at a better price, we think the same result should be reached in case of the bellies as in that of the bacon. We think the Government should pay the difference between the fair contract price, as found by the Court of Claims, and the actual sales of the material remaining. In that view there should be added to the recovery on the cross appeal \$212,216.69, the excess of the contract price over the net amount realized. The judgment of the Court of Claims is accordingly affirmed for the amount already allowed by it, with directions to allow the additional amount now awarded on the cross appeal.

A true copy.

Test:

Clerk, Supreme Court, U. S.